

SEA INSURANCE

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SEA INSURANCE

ACCORDING TO

BRITISH STATUTE

BY

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MACMILLAN AND CO., LIMITED
ST. MARTIN'S STREET, LONDON

1914

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P R E F A C E

THE passing of the Marine Insurance Act of 1906 (6 Edw. VII. Ch. 41) was the commencement of a new era in the law and practice of Marine Insurance in Britain. The object of the introducers of that Act was to reproduce as exactly as possible the law as it then existed without making any attempt to amend it. Consequently, the Act, except in one or two minor particulars, gives in a systematic form the results of all important decisions rendered by English Courts in matters of Marine Insurance. Since the Act came into effect on 1st January 1907 there has not been the same necessity as formerly to refer to decisions on points at issue, though it must be confessed that it is only very slowly and gradually that those engaged in the practice of Marine Insurance are accustoming themselves to refer to sections of the Marine Insurance Act rather than to the decisions of special cases which are embodied therein. There is always the feeling, particularly in the non-legal mind, that it is better to prefer the definite statement of an actual case to the necessarily more indefinite statement of a general principle such as is found in a code. It has therefore appeared to the writer that in the present state of opinion the most useful kind of guide to the law and practice of Marine Insurance would be a detailed statement of the provisions of the Marine Insurance Act with a supplement consisting of the essential parts of the great leading judgments upon which the Act has confessedly been constructed.

It is thought that such a supplement may be of value, not only historically, but as affording an explanation of points in the Act which may in the course of years become less, clear than they were to the framers of the Bill and to the various authorities and bodies to whom it was submitted before it assumed its final form. In the decision of *Vagliano v. Bank of England* (1891, A.C., H.L. p. 499) Lord Herschell remarked that a codifying Act must be construed according to its natural meaning, without regard to the previous state of the law, and that only in case of doubt can resort be had to the previous law. This principle was applied by Mr. Justice Pickford in *Polurrian Steamship Company v. Young* (24th November 1913, K.B.D.) to the Marine Insurance Act:

“ It had been laid down that if the language (of the Act) were clear one could not look at what the law was previously, but that if the language of the Act was not clear, the previous law could be looked at to see which construction ought to be adopted ” (30 Times L.R. 127).

5 CASTLE STREET, LIVERPOOL,
6th June 1914.

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ERRATA

Page 8, bottom line, for "and contracts" read "to the contract."
,, 27, line 3, after "section" insert "(*Blackburn v. Vigors*, 1897)."
,, 63, line 8 from foot, for "due" read "deemed."
,, 73, line 12, for "comes" read "come."
,, 81, line 25, for "they were" read "it was."
,, 113, line 1, for "Acts" read "Act."
,, 135, heading, read "Deductions in Particular and General Average."
,, 169, line 12, for "measures" read "measure."

MARINE INSURANCE ACT, 1906

[6 EDW. 7. CH. 41.]

ARRANGEMENT OF SECTIONS

A.D. 190

Marine Insurance

Section

1. Marine insurance defined.
2. Mixed sea and land risks.
3. Marine adventure and maritime perils defined.

Insurable Interest

4. Avoidance of wagering or gaming contracts.
5. Insurable interest defined.
6. When interest must attach.
7. Defeasible or contingent interest.
8. Partial interest.
9. Re-insurance.
10. Bottomry.
11. Master's and seamen's wages.
12. Advance freight.
13. Charges of insurance.
14. Quantum of interest.
15. Assignment of interest.

Insurable Value

16. Measure of insurable value.

Disclosure and Representations

17. Insurance is *uberrimae fidei*.
18. Disclosure by assured.
19. Disclosure by agent effecting insurance.
20. Representations pending negotiation of contract.
21. When contract is deemed to be concluded.

The Policy

22. Contract must be embodied in policy.
23. What policy must specify.
24. Signature of insurer.
25. Voyage and time policies.
26. Designation of subject-matter.
27. Valued policy.

A.D. 1906.

An Act to codify the Law relating to Marine Insurance
[21st December 1906.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Marine Insurance

Marine insurance defined.

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Mixed sea and land risks.

2.—(1) A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage.

(2) Where a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

Marine adventure and maritime perils defined.

3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest

4.—(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

(b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term :

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

5.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

6.—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected :

Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

7.—(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them,

Avoidance
of wager-
ing or
gaming
contracts.

Insurable
interest
defined.

When
interest
must
attach.

Defeasible
or con-
tingent
interest.

A.D. 1906. — he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

Partial interest. 8. A partial interest of any nature is insurable.

Re-insurance. 9.—(1) The insurer under a contract of marine insurance has an insurable interest in his risk, and may re-insure in respect of it.
(2) Unless the policy otherwise provides, the original assured has no right or interest in respect of such re-insurance.

Bottomry. 10. Theender of money on bottomry or respondentia has an insurable interest in respect of the loan.

Master's and seamen's wages. 11. The master or any member of the crew of a ship has an insurable interest in respect of his wages.

Advance freight. 12. In the case of advance freight, the person advancing the freight has an insurable interest, in so far as such freight is not repayable in case of loss.

Charges of insurance. 13. The assured has an insurable interest in the charges of any insurance which he may effect.

Quantum of interest. 14.—(1) Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value thereof, and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.
(2) A mortgagee, consignee, or other person having an interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.
(3) The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss.

Assignment of interest. 15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.
But the provisions of this section do not affect a transmission of interest by operation of law.

Insurable Value

Measure of insurable value. 16. Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—
(1) In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and

crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole :

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade :

- (2) In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance :
- (3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole :
- (4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Disclosure and Representations

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18.—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely :—

- (a) Any circumstance which diminishes the risk ;
- (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ;
- (c) Any circumstance as to which information is waived by the insurer ;
- (d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

A.D. 1906.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.
 (5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure
by agent
effecting
insurance.

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and
 (b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Repre-
sentations
pending
negotia-
tion of
contract.

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good faith.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

When
contract
is deemed
to be con-
cluded.

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

The Policy

Contract
must be
embodied
in policy.

22. Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act. The policy may

be executed and issued either at the time when the contract is ^{A.D. 1906.} concluded, or afterwards.

23. A marine policy must specify—

(1) The name of the assured, or of some person who effects the insurance on his behalf : What policy must specify.

(2) The subject-matter insured and the risk insured against :

(3) The voyage, or period of time, or both, as the case may be, covered by the insurance :

(4) The sum or sums insured :

(5) The name or names of the insurers.

24.—(1) A marine policy must be signed by ~~or~~ on behalf ^{Signature} of the insurer, provided that in the case of a corporation the ^{of insurer} corporate seal ~~may~~ be sufficient, but nothing in this section shall be construed as requiring the subscription of a corporation to be under seal.

(2) Where a policy is subscribed by ~~or~~ on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured.

25.—(1) Where the contract is to insure the subject-matter ^{Voyage and time} at and from, or from one place to another or others, the policy is called a "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called a "time-policy." A contract for both voyage and time may be included in the same policy.

(2) Subject to the provisions of section eleven of the Finance ^{1 Edw. vii.} Act, 1901, a time policy which is made for any time exceeding ^{c. 7.} twelve months is invalid.

26.—(1) The subject-matter insured must be designated in a marine policy with reasonable certainty. Designation of subject-matter.

(2) The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy.

(3) Where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered.

(4) In the application of this section regard shall be had to any usage regulating the designation of the subject-matter insured.

27.—(1) A policy may be either valued or unvalued. Valued policy.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

(3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

A.D. 1906.

Unvalued policy.

Floating policy by ship or ships.

Construction of terms in policy.

Premium to be arranged.

Double insurance.

28. An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner hereinbefore specified.

29.—(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration.

(2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner.

(3) Unless the policy otherwise provides, the declarations must be made in the order of dispatch or shipment. They must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission or erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

(4) Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an unvalued policy as regards the subject-matter of that declaration.

30.—(1) A policy may be in the form in the First Schedule to this Act.

(2) Subject to the provisions of this Act, and unless the context of the policy otherwise requires, the terms and expressions mentioned in the First Schedule to this Act shall be construed as having the scope and meaning in that schedule assigned to them.

31.—(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable.

(2) Where an insurance is effected on the terms that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.

Double Insurance

32.—(1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

(2) Where the assured is over-insured by double insurance—

(a) The assured, unless the policy otherwise provides, may claim payment from the insurers in such order as he may think fit, provided that he is not entitled to receive any sum in excess of the indemnity allowed by this Act;

(b) Where the policy under which the assured claims is a valued policy, the assured must give credit as against the valuation for any sum received by him under any other policy without regard to the actual value of the subject-matter insured;

(c) Where the policy under which the assured claims is an unvalued policy he must give credit, as against the full insurable value, for any sum received by him under any other policy;

(d) Where the assured receives any sum in excess of the indemnity allowed by this Act, he is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.

Warranties, etc.

33.—(1) A warranty, in the following sections relating to Nature of warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

34.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

35.—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

• (2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

36.—(1) Where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that

Warranty of neutrality.

A.D. 1906. the property shall have a neutral character at the commencement of the risk, and that, so far as the assured can control the matter, its neutral character shall be preserved during the risk.

(2) Where a ship is expressly warranted "neutral" there is also an implied condition that, so far as the assured can control the matter, she shall be properly documented, that is to say, that she shall carry the necessary papers to establish her neutrality, and that she shall not falsify or suppress her papers, or use simulated papers. If any loss occurs through breach of this condition, the insurer may avoid the contract.

No implied warranty of nationality
Warranty of good safety.

37. There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk.

38. Where the subject-matter insured is warranted "well" or "in good safety" on a particular day, it is sufficient if it be safe at any time during that day.

Warranty of seaworthiness of ship.

39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

No implied warranty that goods are seaworthy.

40.—(1) In a policy on goods or other moveables there is no implied warranty that the goods or moveables are seaworthy.

(2) In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy.

Warranty of legality.

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

The Voyage

A.D. 1906.

42.—(1) Where the subject-matter is insured by a voyage policy “at and from” or “from” a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

Implied condition as to commencement of risk.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

43. Where the place of departure is specified by the policy, and the ship instead of sailing from that place sails from any other place, the risk does not attach.

Alteration of port of departure.

44. Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

Sailing for different destination.

45.—(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

Change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

46.—(1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

Deviation.

(2) There is a deviation from the voyage contemplated by the policy—

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or
 (b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

47.—(1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

Several ports of discharge.

A.D. 1906.

(2) Where the policy is to "ports of discharge," within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

Delay in voyage.

48. In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

Excuses for deviation or delay.

49.—(1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused—

- (a) Where authorised by any special term in the policy; or
- (b) Where caused by circumstances beyond the control of the master and his employer; or
- (c) Where reasonably necessary in order to comply with an express or implied warranty; or
- (d) Where reasonably necessary for the safety of the ship or subject-matter insured; or
- (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or
- (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or
- (g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch.

Assignment of Policy

When and how policy is assignable.

50.—(1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.

(2) Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

(3) A marine policy may be assigned by indorsement thereon or in other customary manner.

Assured who has no interest cannot assign.

51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative;

Provided that nothing in this section affects the assignment A.D. 1906. of a policy after loss.

The Premium

52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent.

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such receipt on acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment

55.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

- (a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;
- (b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;
- (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage

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Partial
and total
loss.

and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

56.—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive, as well as an actual, total loss.

(4) Where the assured brings an action for a total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks, or otherwise, they are incapable of identification, the loss, if any, is partial, and not total.

Actual
total loss.

57.—(1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

Missing
ship.

58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

Effect of
tranship-
ment, etc.

59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any special stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the insurer continues, notwithstanding the landing or transhipment.

60.—(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

(2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered ; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired ; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.

Effect of
constructive total
loss.

62.—(1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the insurer, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

(2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the insurer.

(3) Notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

(4) Where notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment.

(5) The acceptance of an abandonment may be either express or implied from the conduct of the insurer. The mere silence of the insurer after notice is not an acceptance.

(6) Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

(7) Notice of abandonment is unnecessary where, at the time when the assured receives information of the loss, there would be no possibility of benefit to the insurer if notice were given to him.

(8) Notice of abandonment may be waived by the insurer.

(9) Where an insurer has re-insured his risk, no notice of abandonment need be given by him.

63.—(1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever

Effect of
abandonment.

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may remain of the subject-matter insured, and all proprietary rights incidental thereto.

(2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

Partial Losses (including Salvage and General Average and Particular Charges)

Particular average loss.

64.—(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

Salvage charges.

65.—(1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by those perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances under which they were incurred.

General average loss.

66.—(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of a general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer. A.D. 1906.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of, a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.

Measure of Indemnity

67.—(1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity. Extent of liability of insurer for loss.

(2) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

68. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured, Total loss.

- (1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy :
- (2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows :— Partial loss of ship.

- (1) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty :
- (2) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaid damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above :

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(3) Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

Partial loss of freight.

70. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

Partial loss of goods, merchandise, etc.

71. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows :—

(1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy :

(2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss :

(3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value :

(4) "Gross value" means the wholesale price or, if there be no such price, the estimated value, with, in either case, freight, landing charges, and duty paid beforehand ; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. "Gross proceeds" means the actual price obtained at a sale where all charges on sale are paid by the sellers.

Apportionment of valuation.

72.—(1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insur-

able value of the whole, ascertained in both cases as provided by this Act. A.D. 1906.

(2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

73.—(1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value; but, if such subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

(2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

74. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability. Liabilities to third parties.

75.—(1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the measure of indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case. General provisions as to measure of indemnity.

(2) Nothing in the provisions of this Act relating to the measure of indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing that at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

76.—(1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part. Particular average warranties.

(2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant

A.D. 1906. to the provisions of the suing and labouring clause in order to avert a loss insured against.

(3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

(4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

Successive losses. **77.**—(1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of such losses may exceed the sum insured.

(2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss:

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

Suing and labouring clause. **78.**—(1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Rights of Insurer on Payment

Right of subrogation.

79.—(1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

(2) Subject to the foregoing provisions, where the insurer

pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss. A.D. 1906.

80.—(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. Right of contribution.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance. Effect of under insurance.

Return of Premium

82. Where the premium, or a proportionate part thereof is, by this Act, declared to be returnable, Enforce-
ment of
return.

- (a) If already paid, it may be recovered by the assured from the insurer ; and
- (b) If unpaid, it may be retained by the assured or his agent.

83. Where the policy contains a stipulation for the return of the premium, or a proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured. Return by agreement.

84.—(1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured. Return for failure of considera-
tion.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

- (3) In particular—

(a) Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured ; but if the risk is not apportionable, and has once attached, the premium is not returnable :

(b) Where the subject-matter insured, or part thereof, has

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never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable:

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival;

- (c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering;
- (d) Where the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable;
- (e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable;
- (f) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable:

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy, and when the double insurance is effected knowingly by the assured no premium is returnable.

Mutual Insurance

Modification of Act in case of mutual insurance.

85.—(1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to the premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

Supplemental

Ratification by assured.

86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose

behalf it is effected may ratify the contract even after he is aware A.D. 1906. of a loss.

87.—(1) Where any right, duty, or liability would arise Implied under a contract of marine insurance by implication of law, it obligations may be negatived or varied by express agreement, or by usage, varied by if the usage be such as to bind both parties to the contract. agreement or usage.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

88. Where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question what is reasonable is a question of fact. Reasonable time, etc. a question of fact.

89. Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding. Slip as evidence.

90. In this Act, unless the context or subject-matter otherwise requires,— Interpretation of terms.

“Action” includes counter-claim and set off :

“Freight” includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money :

“Moveables” means any moveable tangible property, other than the ship, and includes money, valuable securities, and other documents :

“Policy” means a marine policy.

91.—(1) Nothing in this Act, or in any repeal effected thereby, Savings. shall affect—

(a) The provisions of the Stamp Act, 1891, or any enactment 54 & 55 for the time being in force relating to the revenue ; Vict. c. 39.

(b) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same ; 25 & 26 Vict. c. 89.

(c) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

• 92. The enactments mentioned in the Second Schedule to Repeals. this Act are hereby repealed to the extent specified in that schedule.

93. This Act shall come into operation on the first day of Commencement. January one thousand nine hundred and seven.

94. This Act may be cited as the Marine Insurance Act, Short title. 1906.

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SCHEDULES.

Section 30.

FIRST SCHEDULE

FORM OF POLICY

Lloyd's S.G. policy. BE IT KNOWN THAT as well in own name as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part, or in all doth make assurance and cause and them, and every of them, to be insured lost or not lost, at and from

Upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture, of and in the good ship or vessel called the whereof is master under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the said ship, or the master thereof, is or shall be named or called; beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship,

upon the said ship, etc.

and so shall continue and endure, during her abode there, upon the said ship, etc. And further, until the said ship, with all her ordnance, tackle, apparel, etc., and goods and merchandises whatsoever shall be arrived at

upon the said ship, etc., until she hath moored at anchor twenty-four hours in good safety; and upon the goods and merchandises, until the same be there discharged and safely landed. And it shall be lawful for the said ship, etc., in this voyage, to proceed and sail to and touch and stay at any ports or places whatsoever

without prejudice to this insurance. The said ship, etc., goods and merchandises, etc., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counterpart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, etc., or any part thereof. And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his

[Sue and labour clause.]

sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver, or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we, the assurers, are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of ^{A.D. 1906.}

IN WITNESS whereof we, the assurers, have subscribed our names and sums assured in London.

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded—sugar, tobacco, random. [Memo.] hemp, flax, hides and skins are warranted free from average, under five pounds per cent, and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent unless general, or the ship be stranded.

Rules for Construction of Policy

The following are the rules referred to by this Act for the construction of a policy in the above or other like form, where the context does not otherwise require:—

1. Where the subject-matter is insured “lost or not lost,” and the loss has occurred before the contract is concluded, the risk ^{Lost or not} attaches unless at such time the assured was aware of the loss, and the insurer was not.
2. Where the subject-matter is insured “from” a particular place, the risk does not attach until the ship starts on the voyage insured.
- 3.—(a) Where a ship is insured “at and from” a particular place, and she is at that place in good safety when the contract is concluded, the risk attaches immediately. ^{At and from.}
(b) If she be not at that place when the contract is concluded the risk attaches as soon as she arrives there in good safety, and, unless the policy otherwise provides, it is immaterial that she is covered by another policy for a specified time after arrival.
- (c) Where chartered freight is insured “at and from” a particular place, and the ship is at that place in good safety when the contract is concluded the risk attaches immediately. If she be not there when the contract is concluded, the risk attaches as soon as she arrives there in good safety.
- (d) Where freight, other than chartered freight, is payable without special conditions and is insured “at and from” a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped; provided that if there be cargo in readiness which belongs to the shipowner, or which some other person has contracted with him to ship, the risk attaches as soon as the ship is ready to receive such cargo.
4. Where goods or other moveables are insured “from the loading thereof,” the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship. ^{From the loading thereof.}

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Safely landed.

Touch and stay.

Perils of the seas.

Pirates.

Thieves.

Restraint of princes.

Barratry.

All other perils.

Average unless general.

Stranded.

Ship.

Freight.

Goods.

5. Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

6. In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise the ship to depart from the course of her voyage from the port of departure to the port of destination.

7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

8. The term "pirates" includes passengers who mutiny and rioters who attack the ship from the shore.

9. The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.

10. The term "arrests, etc., of kings, princes, and people" refers to political or executive acts, and does not include a loss caused by riot or by ordinary judicial process.

11. The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.

12. The term "all other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

13. The term "average unless general" means a partial loss of the subject-matter insured other than a general average loss, and does not include "particular charges."

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached and, if the policy be on goods, that the damaged goods are on board.

15. The term "ship" includes the hull, materials and outfit, stores and provisions for the officers and crew, and, in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also, in the case of a steamship, the machinery, boilers, and coals and engine stores, if owned by the assured.

16. The term "freight" includes the profit derivable by a ship-owner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

SECOND SCHEDULE

A.D. 1906.

ENACTMENTS REPEALED

Section 92.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
19 Geo. 2. c. 37.	An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.	The whole Act.
28 Geo. 3. c. 56.	An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled, "An Act for regulating Insurances on Ships, and on goods, merchandizes, or effects," and for substituting other provisions for the like purpose in lieu thereof.	The whole Act so far as it relates to marine insurance.
31 & 32 Vict. c. 86.	The Policies of Marine Assurance Act, 1868.	The whole Act.

MARINE INSURANCE (GAMBLING POLICIES)

ACT, 1909

[9 EDW. 7. CH. 12.]

CHAPTER 12

An Act to prohibit Gambling on Loss by Maritime Perils.

^{A.D. 1909.} [20th October 1909.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

I.—(1) If—

(a) any person effects a contract of marine insurance without having any *bona fide* interest, direct or indirect, either in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such an interest; or

(b) any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding six months or to a fine not exceeding one hundred pounds, and in either case to forfeit to the Crown any money he may receive under the contract.

(2) Any broker or other person through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like

A.D. 1909. penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

(3) Proceedings under this Act shall not be instituted without the consent in England of the Attorney-General, in Scotland of the Lord Advocate, and in Ireland of the Attorney-General for Ireland.

(4) Proceedings shall not be instituted under this Act against a person (other than a person in the employment of the owner of the ship in relation to which the contract was made) alleged to have effected a contract by way of gambling on loss by maritime perils until an opportunity has been afforded him of showing that the contract was not such a contract as aforesaid, and any information given by that person for that purpose shall not be admissible in evidence against him in any prosecution under this Act.

(5) If proceedings under this Act are taken against any person (other than a person in the employment of the owner of the ship in relation to which the contract was made) for effecting such a contract, and the contract was made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term, the contract shall be deemed to be a contract by way of gambling on loss by maritime perils unless the contrary is proved.

(6) For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed either in the place in which the same actually was committed or in any place in which the offender may be.

(7) Any person aggrieved by an order or decision of a court of summary jurisdiction under this Act, may appeal to quarter sessions.

(8) For the purposes of this Act the expression "owner" includes charterer.

(9) Subsection (7) of this section shall not apply to Scotland.

Short title. 2. This Act may be cited as the Marine Insurance (Gambling Policies) Act, 1909, and the Marine Insurance Act, 1906, and this
 6 Edw. 7. c. 41. Act may be cited together as the Marine Insurance Acts, 1906 and 1909.

HISTORICAL SKETCH

THE origin of Marine Insurance is lost in obscurity, but it is certain that the insurance of ventures at sea was a well-established branch of commerce long before the kindred businesses of Fire and Life Insurance came into existence. Villani, a fourteenth-century Florentine historian, says that when the Jews were expelled from France in 1182 they adopted some system of insurance of their property. We do not know what authority he had for making this statement, but the statement itself proves that when Villani wrote, prior to 1348, insurance was an established practice in North Italy. The Lombard merchants of those days had in their hands all the banking and oversea trade of Europe as far as the Crimea on the east, and London and Bruges on the west and north. The Lombard merchants, especially the Genoese, spread all over middle Europe, and established themselves as bankers in every country, leaving their mark in commercial centres in street names (as in Lombard Street, London) and in commercial terms still existing in the vocabularies of all trading nations.

The records of repeated failures on the part of native merchants to exclude Italians from the trade of carrying into England, the constant reference in early English policies of insurance to "the surest writing or policy of Insurance heretofore made in Lombard Street," the fact that so many early London policies are either written in Italian or subscribed in Italian all tend to prove that Marine Insurance was brought into our country by Lombards. Malyne, an English writer of 1622, states that the Antwerp policy of his day contained a clause referring to Lombard Street in London from which it might fairly be concluded

that the practice of Marine Insurance was at that time established in Antwerp on the model adopted in London. But whether it was introduced into Antwerp by Lombards, Englishmen, or Flemings is uncertain. It is interesting to know that the earliest Policy in English yet discovered provides that the insurance it grants "shall be so strонге and good as the most ample writinge of assurans whiche is used to be maid in the strete of London or in the burse of Andwerp." (Policy on the *Sancta Crux*, Isles of Indea of Calicut unto Lixborne, dated London, 5th August 1555.) The next most ancient Policy in English of which we have knowledge is preserved in the Tanner MS., No. 74, fo. 32, Bodleian Library, Oxford. It is dated 1613. Unfortunately the MS. contains no names of insurers or amounts insured, but it is interesting on two accounts. It covers goods on a vessel called the *Tiger*, from London to Zante Petrassse and Saphalonia. This recalls Shakespeare's *Macbeth*, I. iii. 7 (written between 1603 and 1610) :

Her husband's to Aleppo gone, Master of the *Tiger*.

Clark and Wright's note (in the Clarendon Press Series edition of *Macbeth*) cites Sir Kenelm Digby's journal of 1628 mentioning the *Tyger* of London going for Scanderone (Alexandretta). Hakluyt (*Voyages*) gives letters and journals of a voyage of the *Tiger* of London to Tripolis in 1583. In *Twelfth Night*, v. i. 65, Shakespeare again mentions a ship called the *Tiger* :

And this is he that did the *Tiger* board.

The other point of interest is that the text of the Policy by the *Tiger* is much more ample than that of any earlier policies issued in England, whether written in Italian or in English. It details the perils insured against in words closely resembling the Florentine formula of 1523 and differing only slightly from the form adopted by Lloyd's at a general meeting held in 1779, and afterwards incorporated in the Sea Insurance Stamp Act of 1795, which is the stem form of all modern British and American Marine Insurance Policies.

Meanwhile on the Continent Marine Insurance had taken

firm root in the leading commercial communities, as can best be seen on consideration of the various ordinances and codes which comprised in more or less systematic form the insurance usages that had developed in different centres. The most notable of these are*:

- The Ordinances of Barcelona, 1434, 1458, 1461, 1484.
- The Ordinances of Florence, 1523.
- The Ordinances of Burgos, 1538.
- The Ordinances of Bilbao, 1560.

These Ordinances have been specially examined, described, and commented upon by Dr. Carl Ferdinand Reatz in the first and only volume of his unfortunately uncompleted *History of European Sea Insurance Law*, 1870. Holland produced

- The Ordinance of Middelburg, 1600.
- The Ordinances of Rotterdam, 1604, 1635, 1655.

Rouen had the exceptional credit of producing in the third quarter of the sixteenth century a handy guide to Marine Insurance entitled *Le Guidon de la mer*; and in 1656 Étienne Cleirac published there his *Us et Coutumes de la mer*. This was followed in 1681 by the great *Ordonnance de la marine*, acknowledged to be one of the most perfect achievements in codification ever accomplished. It was undertaken and completed under the direction of Colbert, the great minister of Louis XIV. But by a singular and cruel irony the name of its actual composer remains utterly unknown. This work, through Lord Mansfield, has had an enormous influence on the law and practice of Marine Insurance in Britain and America. Its authority in France was so great that when Napoleon first issued his codes great part of Colbert's *Ordonnance* was incorporated with slight alteration, so that one may regard as a revision and continuation of the *Ordonnance* the

Code de Commerce of 1807,

which has been the model for nearly all the modern codes of commercial law, including Sea Insurance, adopted by the different countries of Continental Europe.

Meanwhile the Hanse towns had contributed to insurance

legislation by the issue in 1731 of the Underwriting and Average Regulations of the City of Hamburg, a translation of which appeared in *Lloyd's List* of 12th, 17th, and 19th February 1903. Later they issued the

Hamburg Conditions of Marine Insurance, 1847,
revised 1867,

Bremen Conditions of Marine Insurance,

both of which are excellent compendia of Marine Insurance as practised in these cities. It is doubtful whether it would have been possible, without the previous existence of those two sets of conditions, for Germany to produce the excellent German Maritime Code which Mr. Justice Willes described as perhaps "the best considered" code existing, "being the joint production of the lawyers and merchants of North Germany." The last revision of this code took effect on 1st January 1900, and on 1st January 1910 the new German law relating to the Contract of Insurance took effect.

Going back to England we find matters proceeding along very different lines. The English-speaking peoples were late in overcoming their disability to compile codes or to adapt their legal requirements and results to that form of expression. Till 1906 there was neither code nor ordinance to refer to, and down to the middle of the eighteenth century there is great dearth of reported legal decisions. Park, in the introduction to his book on Marine Insurance, says: "I am sure I rather go beyond bounds if I assert that in all our reporters from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases on matters of insurance. Even those cases which are reported are such loose notes, mostly of trials at *nisi prius*, containing a short opinion of a single judge, and very often no opinion at all, but merely a general verdict, that little information can be collected upon the subject. From hence it must necessarily follow that as there have been few positive regulations upon insurances, the principles upon which they were founded could never have been widely diffused, nor very generally known." The explanation of this poverty in the matter of legal decisions is explained by the fact that

till 1601 differences seem to have been generally settled by arbitration. An Act of Parliament of that year (43 Elizabeth, c. 12) instituted a Court of Policies of Insurance, to consist of an Admiralty Judge, the Recorder of London, two Doctors of Civil Law, two common lawyers, and eight merchants, any five of whom were empowered to hear and decide all causes arising in London. The limitation of the jurisdiction of this Court may have been a cause of its inactivity, but a far more likely explanation lies in the fact that an adverse decision in the Court of Policies of Insurance did not preclude the reopening of the whole dispute in a court of common law. In any case by 1720 the Court of Policies of Insurance had fallen entirely into disuse and arbitration had taken its place. Consequently when William Murray, Lord Mansfield, came to the Court of King's Bench, where he presided till 1778, he found what was practically a clear field. Park tells us that before Mansfield's time the whole case "was left generally to the jury without any minute statement from the bench of the principles of law on which insurances were established. . . . Lord Mansfield in his statement of the case to the jury enlarged upon the rules and principles of law, as applicable to that case; and left it to them to make the application of those principles to the facts in evidence before them." Lord Mansfield may be said to have created the English law of Marine Insurance as it now is. He made use of all the Continental ordinances and codes extant in his day, accepting his legal principles largely from them. The customs and practices of trade he learnt from mercantile special jurors, who in the course of time became experts in Marine Insurance matters. Between his day and 1906 any legislation passed to deal with Marine Insurance referred solely to the prohibiting of certain insurances (wager policies, etc.), the naming in the policy of parties interested therein, and the imposition of stamp duty for revenue purposes. Meanwhile the number of reported cases rose to about two thousand. In 1894 Lord Herschell (then Lord Chancellor) introduced his Marine Insurance bill in which he endeavoured "to reproduce as exactly as possible the existing law relating to marine insurance." After

Lord Herschell's death, Lord Chancellor Halsbury took up the bill introducing it in the House of Lords in 1899 and again in 1900: he appointed a Committee on which underwriters, shipowners, and average adjusters were represented, and, presiding himself, went through the bill with them clause by clause. The bill was then passed by the House of Lords, but it was always blocked in the House of Commons till 1906 when it was taken up by Lord Chancellor Loreburn in conjunction with Lord Halsbury. It had meanwhile been subjected to a most rigorous examination by the leading commercial, legal, and insurance associations of the United Kingdom, and after some amendment and modification it was finally passed by both Houses and became law on 1st January 1907 (6 Edw. VII. c. 41).

This first step in British legislation on the subject of Marine Insurance has been followed by the passing in 1909 of an Act intended to prevent gambling in Marine Insurance and the improper use of the class of policies known as P.P.I. Policies (Policies Proof of Interest). This Act is known as the Act to prohibit Gambling on Loss by Maritime Perils (9 Ed. VII. c. 12).

In the United States of America legislation has had a less happy fate. An insurance code intended to form part of a proposed civil code for the State of New York was completed and published in 1865, but it never became part of the law of the state, although a very slightly altered version of it was adopted in California and has been in effect there since 1st January 1873. Consequently, with the exception of California, the law of the different states of the Union as regards Marine Insurance is the case law of each separate state, mainly founded on English precedents, and regulated by the decisions of the United States Circuit Courts and the Supreme Court of the United States.

Marine Insurance, being a factor in almost every transaction of oversea trade, naturally tends to become an international business. It follows that those engaged in this business, or making use of it in their commercial transactions experience at times difficulties arising from the differences existing between the Statutes or practice of different states affecting Marine Insurance. Attempts have been made to

find a remedy for these differences. At the Buffalo Conference of the International Law Association held in 1899, a body of rules was prepared dealing with those portions of Marine Insurance in which the laws and practices of different maritime countries disagree. It was found that there are four important subjects on which great divergence prevails :

- (a) Constructive Total Loss.
- (b) Deductions from cost of repairs, new for old.
- (c) Effect of unseaworthiness and negligence.
- (d) Double Insurance.

The Conference succeeded in carrying resolutions regarding the three last-named subjects, but the suggestions made regarding Constructive Total Loss were not acceptable. The Glasgow Conference of the same Association held in 1901 adopted the rules, after excepting time policies from the scope of the rule of seaworthiness, and it was agreed that the rules should be known as the Glasgow Marine Insurance Rules. But the writer is not aware of any case in which they have been put into practice in connection with any insurance or embodied in any policy, either textually or by reference. The probability is that this results from the unwillingness of English and American underwriters to consent to the practical annihilation of the seaworthiness warranty and the equal unwillingness of American and Continental assured to accept the stricter rule of Constructive Loss embodied in English law so long as their national law enforces on the underwriter terms more favourable to the assured. Besides it was felt strongly in England that it was almost absurd, before the definitive form of the Marine Insurance Act was reached, to discuss the provisions of an international code intended to supersede English law. These variations may be matters for adjustment by variation in the rate of premium, although this is by no means certain ; or it may be that the fewness of the international insurance markets of the world diminishes the need for uniform international regulations on these matters.

COMMENTARY ON THE MARINE INSURANCE
ACT, 1906
6 EDW. VII. C. 41

PRELIMINARY NOTIONS AND DEFINITIONS

§ 1. As the determining element of the intent of a contract is the common intention of the contracting parties, it becomes necessary to consider what is the intention common to a merchant or shipowner (or broker acting on behalf of either of them) offering a risk, and to an insurer (underwriter) accepting it. Put briefly, it is that the merchant or shipowner (or broker) desires the underwriter to assume in respect of the interest which the merchant or shipowner (or broker) wishes to insure, the liability for a certain named proportion of such loss or damage as may chance to accrue to it from certain named perils or dangers, and that the underwriter is content to assume this liability for a certain agreed sum of money. A contract of Marine Insurance is thus a contract of indemnity whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed against marine losses, that is against the losses incident to marine adventure. The indemnity granted by a policy of Marine Insurance is not complete or perfect. The amount recovered may be limited by the value attached to the assured interest in the policy, while owing to the terms and conditions stipulated for by the underwriter certain classes of damage or damage arising from certain causes may not fall on the underwriter but remain at the charge of the assured. On the other hand, if the underwriter accepts a valuation of the subject-matter insured which is above its real value, the valuation being binding on both parties and contracts, involves the under-

writer in the possible payment of a sum exceeding mere indemnity. As regards the marine losses insured against, described as losses incident to marine adventure, it is necessary to say that all losses or damages occurring at sea are not marine losses in the sense in which these words are used in the Act, for instance, ordinary loss of weight occurring to certain classes of goods during transit at sea, the damage suffered from sweat in the vessel's hold without the occurrence of any accidental or extraordinary* cause are not marine losses in an insurance sense. In other words, a distinction is drawn between losses *at* sea and losses or perils *of* the sea.

§ 2. It was found that certain sea trades brought with them the necessity of a certain amount of land risk to the ship's furniture or stores at some particular stage of the voyage, and thus by usage of trade the contract of Marine Insurance was extended so as to protect the assured on land risks of this character. In addition to this, the increasing reach of trading facilities from seaboard to inland points, the opening up of inland waters connected with the sea by rivers or canals to the traffic of sea-going ships have rendered it necessary for merchants embarking upon sea ventures to insure themselves also against lake, river, canal, road, and rail risks, and it has therefore been provided that either by its express terms or by usage of trade the Marine Insurance contract may be extended so as to protect the assured against losses on inland waters or on land. That these extensions were not fanciful or unnecessary is proved by the fact that as soon as an Act of Parliament was passed enabling limited companies to alter their Memorandum of Association, Marine Insurance Companies asked for an extension of their powers to enable them to undertake land risks. Similarly as the launch of a ship involves hazards most distinctly of a marine character, it is but reasonable that marine underwriters should be allowed to protect shipbuilders and shipowners against the risks incurred in this operation. And after the covering of land risks by marine insurers became usual, a further step was taken of insuring vessels during their construction, launch, and fitting out. As the building of a modern steamer is a long

and complicated process, various parts of the vessel being prepared and erected or assembled in different parts of the builder's yard, it has become necessary to include specifically what is known as "Shop Risk," that is the hazard connected with the preparation and completion *outside* the ship, of materials, machinery, or furniture intended finally to be placed on board of her. As matters now stand in the English law of Marine Insurance, any adventure analogous to a marine adventure covered by a policy in the form of a marine policy is regarded as a proper subject for Marine Insurance.

§ 3. By stipulating that subject to the provisions of the Act every lawful marine adventure may be the subject of a contract of Marine Insurance, the Act excludes from its operation all ventures that may be classed as illegal, but in this connection illegality is viewed solely from the point of view of English law, and therefore comprises only such ventures as are prohibited by statute or are contrary to public policy (which expression probably covers good morals). The consequence is that no regard as a rule is paid to customs or revenue laws or regulations of foreign countries, and that in case of war between two foreign states there is no illegality in the employment of an English ship to run a blockade against either power. There is nothing to prevent the owner of a ship or goods engaged in an illegal operation from insuring his risk, nor an underwriter from accepting the risk, but the contract is not one which can be enforced at law.

There is held to be a marine adventure in every case where

- (1) Any ship, goods, or other moveables are exposed to maritime perils. Such property is in the Act called "Insurable Property."
- (2) The earning of any freight, passage money, commission, profit, or other pecuniary benefit is endangered by the exposure of insurable property to maritime perils.
- (3) Any liability to a third party may be incurred by the owner of, or other person interested in, or responsible for, insurable property by reason of maritime perils.

By the words "maritime perils" are meant the perils consequent on or incidental to the navigation of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

The wording given above is made wide enough to embrace the insurances not only upon material articles physically exposed to loss and damage in transit at sea, but also the rights and expectations of advantage or profit derivable from the safe arrival of such articles and protecting against loss or detriment which would accrue to the assured by the non-arrival or damage of or to the same. It likewise protects any party interested in or responsible for such insurable property against any liability to a third party arising out of maritime perils. In the use of the words interest and liability in this connection, it must be understood that the test of the reality of this interest and liability is that it can be estimated pecuniarily, in fact it can be counted in cash.

The maritime perils expressed by the above are taken almost word for word from a form of policy adopted by Lloyd's in 1779. It is the form which appears in the Schedule to the Sea Insurance Stamp Act of 1795 (35 Geo. III. c. 63), and the following explanations of certain of these terms are taken from the rules for a construction of policy in the first Schedule of the Marine Insurance Act :

- “Perils of the seas.”—This term refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.
- “Pirates.”—This term includes passengers who mutiny and rioters who attack the ship from the shore.
- “Thieves.”—This term does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.
- “Restraints of princes and peoples.”—This term refers to political or executive acts, and does not include a loss caused by a riot or ordinary judicial process.
- “Barratry.”—This term includes every wrongful act wilfully committed by the master or crew to the

prejudice of the owner, or, as the case may be, the charterer.

“ Any other perils.”—This term includes only perils similar in kind to the perils specifically mentioned in the policy.

INSURABLE INTEREST

§ 4. Having settled what adventures may be covered by Marine Insurance and the nature of the maritime perils against which protection is given by Marine Insurance, the law then proceeds to decide what persons are entitled to be insured. The contract being a contract of indemnity against maritime perils, it is evident that no one can derive benefit from it who has not some pecuniary interest exposed to these perils. There is an essential difference between insurance such as is contemplated by the law and a bet or wager between two parties, neither of whom need have any interest in the article wagered about, except that which exists in the very wager itself. Consequently while every lawful marine venture may be insured, all contracts of Marine Insurance are void, being regarded as gaming or wagering contracts

- (1) Where the assured has not an insurable interest and has entered into the contract without expectation of acquiring such interest.
- (2) When the policy is a wager policy being made “ interest or no interest ” or “ without further proof of interest than the policy itself ” or “ without benefit of salvage to the insurer,” or subject to any other such-like term.

There may be cases in which the occurrence of a loss does not carry with it the possibility of a salvage, for instance the loss of a cable steamer may prevent the completion of a submarine telegraph as a paying commercial undertaking: consequently an insurance on the safe laying of the cable would be perfectly legal even although it were done on a policy effected without benefit of salvage to the insurer. But such cases are exceptional and can be easily

distinguished from the gaming or wagering policies which the law has decided to be void.

§ 5. Wager policies are (subject to an exception dealt with hereafter) illegal only in the sense that to all legal purposes they are void. They are not prohibited by the law, nor is there any penalty civil or criminal imposed upon those who issue or accept them. But as they cannot be sued upon, the obligation of the underwriter is solely an obligation of honour. This had led to these policies being designated as "Honour" policies. They are of frequent use, being employed for the protection of interests usually genuine but hard to define and of a pecuniary importance difficult to estimate exactly. They are sometimes effected in order to secure against loss by sea perils an enhancement of value of property at sea already insured for the full amount of what was its value at the commencement of the voyage. However, there is no security that this advance in value may not diminish or wholly vanish before the close of the voyage. The Marine Insurance (Gambling Policies) Act of 1909 renders wager policies of the class described above effected on a ship by persons in the employment of an owner of such ship, not being themselves part owner of the ship, illegal: the person effecting it is considered guilty of an offence and is liable on summary conviction to imprisonment with or without hard labour, or to a fine not exceeding One Hundred Pounds, and to forfeit to the Crown any money he may receive under the contract. By the same Act the same penalties are imposed upon any person effecting a contract of Marine Insurance without having a *bona fide* interest direct or indirect, either on the safe arrival of the ship in relation to which the contract is made, or in the safety or preservation of the subject-matter insured, or a *bona fide* expectation of acquiring such interest.

§ 6. The essential of insurable interest is the pecuniary advantage seen at the time of insurance as arising to the assured from the safety or due arrival of the adventure or the pecuniary disadvantage similarly arising from its loss or deterioration. Such interest may lapse or vanish before the arrival or destruction of the venture, and as and in the same proportion as the interest lapses, so and in the

14 ATTACHMENT: "LOST OR NOT LOST"

same proportion lapses the right of the assured to recover from the underwriter. Consequently, in order to recover a loss, the assured must have interest at the time of the loss in the subject-matter insured, though it is not necessary that that interest should have existed at the time the insurance was made.

The Interest must be in the subject-matter insured, because otherwise a loophole might be left open through which might be introduced insurances on ventures in which the assured claims to be interested solely through the existence of a policy of insurance. This might happen without the occurrence in the policy of any of the prohibited clauses such as "without further proof of interest than the policy itself" or any other like clause. It has on this account been suggested that Part 2 of Section 5 of the Act might be improved by the addition of the words "always excepting such benefit or prejudice as may arise solely from the existence of a policy of insurance or other similar contract or undertaking, referring to the said adventure or insurable property."

English policies of insurance have since 1613 contained a clause "lost or not lost," which has given rise to considerable difficulty. Read literally it could only be taken to mean that the underwriter and the assured had made up their minds to carry through a contract of insurance whether the venture insured was at that moment in existence or not. It would almost appear as if the shipowner was allowed to insure with the underwriter a venture which was known to the shipowner to be actually lost. But if it is remembered that the policy of insurance is a contract of indemnity and a contract of the fullest good faith ("uberrimae fidei") it becomes evident that this cannot be so. If the merchant or shipowner, when he offers a risk on a cargo or vessel, knows that the venture is then actually lost, he knows that he is not at that moment in possession of anything connected with that risk whose loss will further damnify him, and that nothing connected with that risk then exists against whose loss the underwriter can indemnify him. Similarly if the underwriter at the time of his acceptance of a risk knows that it has safely arrived at its intended

destination, he knows that there are no perils remaining to the insured venture against which he can give insurance. Consequently, in spite of the absolute wording "lost or not lost," the effect of the clause is merely to secure to the assured the insurance and to the underwriter the premium on all lawful risks, whatever be their position of safety or peril at the time the insurance was effected, provided both parties are in an equal state of knowledge or ignorance. It is consequently necessary to provide that in case of insurances made "lost or not lost" the assured may recover although he was not interested at the time of the loss and did not acquire interest until after the loss, and it is specially enacted that this insurance will be effective unless at the time when the contract of insurance was effected the assured was aware of the loss and the insurer was not; but a person who at the time of the loss has no interest in the venture cannot after he becomes aware of the loss acquire an insurable interest by any act, option, or choice. The first of the Rules for the Construction of Policy contained in the first Schedule of the Act is as follows :

(1) Where the subject-matter is insured "lost or not lost," and a loss has occurred before the contract is concluded, the risk attaches unless at such time the assured was aware of the loss and the insurer was not.

§ 7. An actual interest in a marine venture may be insured against maritime perils although the interest itself may be defeasible, as for instance the case of a captured ship ultimately released by the Prize Court or restored to her owner. A contingent interest, that is an actual interest coming into existence as the result of the occurrence of some possible event, can also be legally insured against maritime perils. For one special class of defeasible interest special provision is made, namely, the case of a buyer of goods who might at his choice have refused acceptance of the goods or have treated them as being at the seller's risk in consequence of the latter's delay in making delivery or otherwise. The buyer is in this case specially endowed with insurable interest. It is difficult to see on what legal ground

this is done: one would have thought that so long as he had only the right of choosing whether he would accept the goods or not or treat them as at the seller's risk, he was not in possession of such relations to the goods as would constitute an insurable interest and justify his effecting insurance. On the other hand, one can well understand a transaction such as the following leading up to an insurable interest on the part of a prospective buyer. A manufacturer of goods offers to deliver by sea to a merchant goods to a certain agreed sample and deliverable within a certain period of time, on condition that if the goods are not up to sample or do not arrive within the period named they are returnable to the manufacturer, but the marine risk from the manufactory to the merchant's warehouse to be declared on the merchant's open policy. This would fulfil in almost every detail the conditions laid down in Clause 2 of Section 7 of the Act. As a matter of fact, in the cross channel trade cases somewhat akin to this occur with considerable regularity, and declarations are often made on merchants' open policies of goods, the property in which does not entirely pass to the merchant until half or more of the marine risk has been run. Sometimes the transfer of property does not legally take place until the sea portion of the transit is over; for example, goods from Glasgow to inland points in Ireland are often insured on the Irish receiver's policy although the goods are sold delivered at the seaport in Ireland whence the inland transit begins.

§ 8. In addition to these more distant interests which almost necessarily affect the whole of any subject-matter insured, it is specially provided that a partial interest of any nature may be insured: this wording is wide enough to include either the whole interest in any one portion of an insurable subject-matter, or an undivided and indivisible interest in the whole of any such subject-matter.

§ 11. Further, the master or any member of the crew of a ship has an insurable interest in respect of his wages. As far as seamen are concerned, this right was conferred on them for the first time by the Marine Insurance Act of 1906. Till then the master was the only member of the ship's

company entitled to insure his remuneration, and it is worth noticing that in some European commercial codes regulations still exist, prohibiting on grounds of public policy the insurance of wages of masters, officers, or crew.

§ 12. It frequently happens that part of the freight of exported goods is prepaid leaving only the balance to be paid at the port of destination, and by English law such freight is not repayable in case of loss unless a special contract is made to the contrary. There is therefore an insurable interest in the case of advance freight in favour of the person advancing the freight, but, of course, only so far as no exceptional contract has been made making it repayable in case of loss. As a matter of fact, the advance freight on goods is usually insured on the same policy as the goods, the values of the two being either stated separately or lumped together. In the latter case the interest insured is properly described as goods and advanced freight.

§ 13. The assured on goods, ship, or other maritime venture is also allowed to have an insurable interest in the premium and other charges of insurance. There are cases where the premium is a matter of considerable importance and where indeed it would be a hardship if insurance were not permissible, such as the case of premiums incurred in advance for a year's navigation. In case of modern steamers even of moderate size these premiums may reach hundreds or even thousands of pounds, and in case of a loss the owner who had insured the bare value of the ship would be left considerably out of pocket. But it has been recognised, both by shipowners and by underwriters, that the interest on premiums thus insured is one that diminishes day by day, and it has consequently become customary to provide by a special clause in the contract that the interest diminishes gradually from the full amount paid (at the commencement of the policy) to nothing (when the risk expires). It has not yet become usual to insure premiums with a *pro rata* daily diminishing clause, but it is very general to find them insured with a diminution clause at the rate of one-twelfth per month.

§§ 10 and 14. There is another class of relation to the subject-matter insured which permits of an insurable interest

in the same, namely the relation of a lender of money on a ship or a cargo or both. Such a relation is evidenced by the existence of bonds on bottomry or respondentia, which are practically mortgages on the ship or cargo in return for which the captain obtains the funds necessary for him to complete his voyage, it being premised that he has not been able to get the necessary funds in any other way, having made every reasonable endeavour to communicate with his owner or the other parties interested in the venture. The existence of such bonds gives rise to an entirely new insurable interest. It is obvious that the shipowner or merchant ought not to be deprived of his right to insure his own property solely because some other person has made an advance secured upon that property. It would be equally unfair to deny to the lender the right of insuring his advance on bottomry or respondentia against the perils of the seas, to which it is exposed to exactly the same extent as the ship or cargo on which the advance is made. There is therefore in perfect equity the anomalous position as regards bottomry and respondentia that the subject-matter insured is twice covered for the amount up to which the advance is made. Further, it is permitted to a mortgagee to insure on behalf of and for the benefit of other persons interested as well as for his own benefit. The law, in fact, goes further, and states generally that a consignee or other person having an interest in the subject-matter insured may insure not only for his own benefit, but on behalf and for the benefit of other persons interested.

§ 15. In many of the operations connected with the transit of commercial property from one point to another the owner of the goods stands in such relations to carriers, bailees, warehouse owners, wharf owners, and other third parties, that they have agreed or have become liable to indemnify him either fully or partially in case of certain losses or damages. It is expressly enacted that in spite of such relations at common law or by contract the owner of the goods still preserves his insurable interest in them up to their full value. On the other hand, when by assignment of interest or otherwise he parts with his interest, it does not follow that the transfer of the subject-matter

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insured to the assignee takes with it the assured's rights under his contract of insurance: to effect this transfer it is necessary that there be an express or implied agreement with the assignee to that effect, but these provisions do not affect such transmission of insured interest as occurs by operation of law.

§ 9. There remains to be specified one other insurable interest, namely that of reinsurance. It is permitted to the underwriter of any marine risk to reinsure the same in whole or part, and unless the original policy (that is the policy by which the underwriter protects the original assured) provides the contrary, the original assured has no right, interest, or concern in the reinsurance which his underwriter may effect. There is thus now a legal basis for a class of operations which was formerly illegal according to the law of this country. From 1746 to 1864 the practice of reinsurance was declared to be unlawful unless the insured were insolvent, bankrupt, or dead. The result of this restriction was not that reinsurance was stopped, but that it continued to exist in a very unsatisfactory form, genuine and necessary commercial operations being covered by "Honour" policies, upon which no legal rights could be based or action taken. The questions of reinsurance business are so important as to merit special and separate consideration and treatment.

To sum up, the ideal form of insurable interest is absolute ownership, and the nearer one comes to that the clearer and more indisputable is the right to effect an insurance. The foregoing paragraphs have shown that, short of absolute property in the subject-matter insured, there is a multiplicity of relations in which persons may stand in respect of a venture at sea, any one of which fully entitles them to claim an insurable interest and to effect an insurance, whether the special interest involved be vessels, goods, freights, advance freights, partial payments for goods, advances against value of goods, actual profits, or anticipated profits. In general terms, it may be said that the reality of an insurable interest is tested by the reality of the would-be assured's relations of property, responsibility, or risk of profit or of loss in respect of the subject-matter insured against the

consequences of maritime perils. But it is remarkable that there is no unanimity amongst the commercial nations of the world regarding one interest which was formerly of considerable importance, namely loans on bottomry and on respondentia. We have seen that the English law permits the full insurance of ship or of goods, and also the full insurance of the amount advanced on a bottomry or respondentia bond. The Ordinance of Louis XIV. (Book III., Tit. 6, Art. 16) forbids borrowers on bottomry to insure the amount lent to them, and lenders on bottomry from insuring their expected profits on their ventures. The Code de Commerce forbids the borrower of bottomry to insure the amount he has borrowed. The German Code permits the lender to insure his loan and the maritime interest. The Italian and new Spanish Codes provide that on ship and goods only the excess of what is covered by bottomry and respondentia may be insured.

INSURABLE VALUE

§ 16. The contract of insurance being a contract of indemnity, it becomes necessary, in order to put that contract in a perfect form, to ascertain not only the fact of the genuine and legal insurable interest, but also the pecuniary value to the assured of the advantage that accrues to him from the safe arrival of the subject-matter insured or of the detriment that accrues to him from its loss or damage. It therefore becomes necessary to determine the insurable value of the subject-matter insured. This consideration raises at once a difficulty originally perceived by Benecke, who published between 1805 and 1821 his important work entitled *System of Marine Insurance and Bottomry*. What constitutes indemnity to a merchant engaged in foreign trade if a venture in which he is interested is lost? If it is said that the recovery from his marine underwriters of the sum he paid for the goods, plus all the shipping expenses and advance freight (if any) which he expended upon them, constitutes indemnity, it would mean that the merchant could not obtain, in case of the failure of his venture through marine perils, that advantage or profit in the hope of which

he embarked on the venture. It would be treating him as if when he undertook this operation he had no expectation of obtaining from its successful completion anything more than the recouping of his actual outlays. But that is notoriously not the object of the merchant, and if insurance is intended to render him independent of sea perils as producing the completion or failure of his venture, he should be entitled to insure such a sum as will, in case of loss, put him in practically the same position as if his venture had arrived in safety and run off successfully. This cannot always be accomplished with complete success. Benecke, in fact, admitted that his system was hardly applicable except "in the conveyance of current merchandise to and from important commercial places." It has therefore become the almost universal commercial practice in England for the merchant and underwriter to agree upon a value to be attributed to the goods insured, or on a standard of valuation to be applied to them, such as invoice cost plus freight, shipping expenses, and an agreed percentage which may be taken to represent the profit anticipated by the merchant. Taken strictly, this system is not one of indemnity, but it acts with perfect fairness to both parties, as the underwriter is never called upon to pay any amount for which he has not received premium. One great complication, however, shows itself when underwriters have to deal with goods proceeding to destinations where they become liable for customs duties of any serious amount. This difficulty will become more apparent in the discussion of Particular Average on goods, but it may be well to explain here that unless an arrangement is made either

- (1) to assess the loss on the values in bond, or
- (2) to insure the duties so that the assessment can fairly be made on the duty-paid values,

the assured or the underwriter will appear to be inequitably treated. Assessment of a loss on the values in bond is practically an assessment before the goods enter the country of their destination. And yet it deprives the underwriter of much of the advantage he should enjoy from the fact of the goods having successfully withstood the perils against

which he insured. Assessment on duty-paid values involves the assured in the payment of premium on customs duties which would not have been incurred had the goods been lost at sea on which, in fact, there was no insurable interest until the goods had arrived at their destination. The difficulty of insuring that has been overcome by insuring the duties free of claim for total loss, but the carrying out of this system involves the exact knowledge of the amount of duty which would be levied at destination, a knowledge which, in consequence of the proverbial ingenuity of customs tariff makers, is very hard of attainment. The result is that in the North Atlantic trade to the United States it has become customary to charge on the declared value of goods an additional premium at the rate of one-third of the premium charged on the goods, which additional premium is considered adequate for the covering of the duties against average. In the same trade there is another method employed to attain the same object or one closely allied to it: an arrangement is made with the underwriter by which the amount of the invoice in foreign currency is transformed into dollars at an agreed rate of exchange considerably differing from the normal rate for that currency; for instance, French invoices are reduced at the rate of 6 francs equal to one dollar, and German invoices at 5 mark equal to one dollar. These valuations apply equally to total loss, and average so that the rate of exchange is obviously meant to cover the anticipated profit, which would be missing totally if the goods were lost and partially if the goods were damaged.

In the case of ships offered for insurance the question of valuation is one of the most important discussed between the assured, his broker, and the underwriter. Ships, like other articles of property, vary in value, and it is found that there is a market whose fluctuations depend upon the supply and demand of ships ready for use, upon the cost at which ships can be supplied by builders, upon the state of trade as affecting the market for freights, the earning of which is the end and the object of the existence of ships, or perhaps more correctly of all ships not exclusively employed by the shipowner in the carriage of goods of his own. The view that the earning of freight constitutes the value of a ship

led Lowndes to state that a ship's "value theoretically is represented by the present or capitalised value of her future earnings added to what she may eventually fetch for breaking up. This is obvious at a glance in the case of a ship so nearly worn out as to be only fit for one voyage more. . . . The principle is, of course, the same in cases where the calculation may be more difficult . . . for the price a man will offer for a ship in the market must at last be regulated by, or find its maximum in, the amount he expects to earn by employing her." But in fact in the early years of a vessel's life it is much more customary to value her at what she cost, minus her ~~net~~ earnings, to her owners, and to correct that value up or down in accordance with the variation at the time of valuation in the cost of building vessels of similar size and equipment. Considered in connection with insurable value, it is doubtful whether the policy of valuation based on the capitalised value of expected freight earnings would hold good in law. It is submitted that a mere anticipation or expectation of profits from freight is not a basis substantial enough upon which to build an insurance: there ought to be an actual secured pecuniary interest in these future freights or a firm engagement of calculable amount. As a matter of fact, the firm freight engagements ahead of any ship are usually far inferior in amount to what is considered her selling or commercial value. As regards freight itself, it is worth noting that this great maritime interest was nowhere mentioned in the printed matter of any English policy before the year 1749. The one rule on which English law insists is that there is no insurable interest on freight unless there is some legally enforceable contract. Such a bargain or contract would of necessity state in money the amount involved, and this amount would be the limit for the insurable value of the interest. In France there prevailed down to 1885 a distinction between the insurance of freight at risk (*frêt à faire*) and freight prepaid or guaranteed (*frêt acquis*). But in 1885 a law was passed giving permission to insure the net freight of a vessel.

The foregoing paragraphs serve to explain the principles upon which shipowners, merchants, and underwriters have

been accustomed to agree to the valuations to be attributed to the interests ordinarily exposed to maritime perils, and therefore suitable for insurance. These values are such as are referred to in the opening words of § 16 of the Marine Insurance Act. They are "express provisions or valuations on the policy." The fact that they are exaggerated is not of itself enough to upset their validity, for having been accepted by the underwriter at the proposal of the assured, the underwriter is naturally held to have agreed to them as part of the basis of his bargain; but they are upset, invalidated, voided, if anything of the nature of fraud or "Barratry" can be proved. Policies thus provided with a valuation are called "Valued Policies." But there is no compulsion on either the assured or the underwriter to state in the policy a valuation for the interest insured, although the amount for which the insurance is done between them must be definitely stated. In consequence of this it has become necessary for the law to provide what values are to be taken as insurable values in the absence of express stipulation. Unvalued policies are nowadays very rare. Some of the authorities state that they still exist in certain cases of insurances on goods, but the present writer has never seen one. Others extend the practice to include freight payable upon arrival; this may have been customary in the days of sailing ships and before the introduction of submarine telegraphy, but it is doubtful if there are nowadays as many as ten cases a year. Where no special contract is made between the assured and underwriter the insurable value of certain matters of insurance is fixed by the law as follows:

- (1) *Ship*.—Her value at the commencement of the risk, including outfit, provisions, stores, advances of wages, and any other outlays expended to make the ship fit for voyage, or the period of navigation covered, *plus* the cost of insurance upon the whole.

NOTE.—In the case of a steamer, the word "ship" includes machinery, boilers, coal and engine stores, but a policy on "hull and machinery" does not cover coals or stores. In the case of a vessel

engaged in a special trade the word “ship” includes the ordinary fittings necessary for that trade.

- (2) *Freight*.—(Whether paid in advance or not)—the gross amount of freight at the risk of the assured, *plus* the cost of insurance.
- (3) *Goods*.—The prime cost, *plus* expenses of and incidental to shipping and cost of insurance.
- (4) Any other interest or subject-matter—the amount of the assured’s risk when the policy attaches, *plus* cost of insurance.

The Rules for Construction of Policy in the first Schedule of the Act give the following definitions of the words “ship,” “freight,” and “goods”:

(15) The term “ship” includes the hull, materials and outfit, stores and provisions for the officers and crew, and in the case of vessels engaged in a special trade, the ordinary fittings requisite for the trade, and also in the case of a steamship the machinery, boilers, and coals and engine stores if owned by the assured.

(16) The term “freight” includes the profit derivable by a ship-owner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

(17) The term “goods” means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically and not under the general denomination of goods.

DISCLOSURES AND REPRESENTATIONS

§§ 17 to 20. In the section on “Insurable Interest” dealing with the effect of the words occurring in the English policy form “lost or not lost” (p. 15), it was indicated that a contract of insurance is a contract of the utmost good faith (“uberrimae fidei”). This is by the Marine Insurance Act made part of the British statute law, with the addition that if the utmost good faith be not observed by either party, the contract may be avoided by the other party. In other words, the discovery by the one party to the contract that the other has not treated him with perfect

good faith entitles the former to annul the contract *if he so wishes*. It is obvious that the want of good faith may be shown either in the incorrectness of things stated as facts or in the refusal to communicate what ought to be stated, that is either in misrepresentation or in concealment. These being the forms in which the absence of good faith manifests itself it is obvious that the essence of good faith lies in full frankness in representation and complete openness in disclosure. But as it is impossible that every detail concerning a maritime venture should be specifically mentioned by a merchant, shipowner, or broker when he is offering it for insurance, the law provides that only those circumstances connected with the risk need be disclosed which are material and are within the knowledge of the assured at the time he offers the risk, the assured being deemed to know every circumstance which in the ordinary course of business ought to be known by him. In this connection everything is considered material which would have any influence on the mind of a prudent underwriter either in determining whether he would accept or decline the risk or in fixing the premium at which he would accept it. Further, the obligation imposed on the assured extends not only to what is within his own knowledge and experience, but also to any communication made to him and any information received by him. The question of the materiality or immateriality of any particular point is in every case to be treated by the Courts as a question of fact. The assumption that the assured knows every circumstance which in the ordinary course of business ought to be known by him, taken in conjunction with the provision that he must disclose any material communication of information coming to his knowledge, imposes a large responsibility upon him. It appears difficult to understand why the policy should be voidable, if the assured has informed the underwriter not only of every material circumstance within his own knowledge, but also of everything material in communications made to or information received by him. It is quite possible that besides all these there is some material fact or circumstance which has never come within his ken, and yet on the wording of Section 18 of the Act the contract

would be voidable by the underwriter. This result, taken in conjunction with the case quoted in illustration of the section, leads to the suspicion that the words "ought to be known by him" are intended to mean "ought to have been brought within his knowledge," for they are intended to deal with cases in which certain persons whose duty it is to keep their employers informed of all matters affecting the property offered for insurance, have withheld information of a material fact from their principals. The concealment of this material fact towards the assured having prevented him from being in a position to communicate it has put a better complexion on the risk than it truly possessed, and has therefore influenced the judgment of the prudent underwriter in determining whether he would accept the risk, or in fixing what he believed to be a premium adequate for it. But there are circumstances which, in the absence of inquiry by the underwriter, the assured need not disclose :

- (a) Anything which diminishes the risk.
- (b) Anything which the underwriter knows or is presumed to know. In the latter class are comprised matters notorious to everybody or of general knowledge and all matters which an underwriter in the ordinary course of his business ought to know. These include the usages of particular trades, information respecting the positions of vessels obtainable in the shipping newspapers, knowledge of ordinary trade routes, the accommodation and resources of particular ports, the position of vessels known to be in trouble, and other similar information.
- (c) Anything regarding which the underwriter indicates he does not wish to be informed, or which he says he disregards.
- (d) Any circumstance the disclosure of which is made superfluous by reason of any warranty expressed in the policy or implied.

By warranty is meant an undertaking by the assured that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or denies the existence of a particular state of facts (see § 33 below).

In the foregoing paragraphs it has been assumed that the risk in question has been offered to the underwriter by the assured himself, the principal; but a new set of considerations arises when the risk is offered not by the principal but by his agent. The obligation is laid upon the broker to disclose to the underwriter every material circumstance within his knowledge. The broker, being an expert in insurance, is presumably better versed than his principal in information respecting risks generally, and when it is stated as a presumption of law that the agent empowered to insure is presumed to know everything which in the ordinary course of business he ought to know, or ought to have been communicated to him, it is plain that the range of information thus demanded is more extensive than that demanded from the principal himself. For everything material in the knowledge of the principal ought to be communicated to the agent, and to this the agent himself is bound to add whatever further material knowledge is at his disposition. It is specially provided that the agent must disclose to the underwriter every material circumstance which the assured is bound to disclose, except only if it come to the assured's knowledge too late for communication to the agent when the latter is effecting the insurance with the underwriter.

Passing from matters of disclosure to matters of representation, the law takes cognisance not only of what the assured or his agent ought to offer the underwriter in the way of information, but also of the replies they give to questions he may put respecting the venture offered for insurance. But there is one difference to observe, namely that the case of concealment has only one degree of intensity, being merely negative, a simple failure to inform (though it may be of various degrees of blame), while misrepresentation being conveyed in actual statements may be of various grades of intensity (as well as of blame). The law is that any material representation (that is, any representation which would influence the judgment of a prudent underwriter in deciding whether he will take the risk or in fixing a premium for it) made by the assured or his agent while the contract is being negotiated and before it is concluded, must be true; if it be untrue, the underwriter has

the choice of voiding the contract or not. But as representations may be made not only regarding matters of fact but also regarding matters of belief or expectation, the law distinguishes between the criterion of truth in the two cases. It regards a representation as to a matter of fact as true if it be substantially correct, that is if a prudent underwriter would not regard as material the difference between what is represented and what is actually correct ; while in matters of expectation or belief representation is held to be true if it is made in good faith. As has already been indicated in discussing disclosure, the information at the command of the assured and of his broker may be varied from time to time by the receipt of later news or communications. With regard to representation, the Act provides that at any time before an insurance is concluded, a representation made at an earlier stage of the proceedings may be withdrawn or corrected. As in the case of disclosure, so in the case of representation the question of materiality or immateriality of any point is by statute declared to be a question of fact.

One important point affecting both misrepresentation and concealment has been left undecided by statute, namely the point of time up to which it is permitted to the underwriter to elect, after he has become conscious of misrepresentation or concealment, whether he will void the contract or not. If the incorrectness or incompleteness of the statements made to the underwriter when the risk is offered do not come to light until after a loss, this question does not arise. But what is the position if the underwriter becomes aware that the statements of the assured were incorrect or incomplete at some time when the fate of the venture is still unknown to both parties ? The matter becomes still more complicated if the interest of the assured was meanwhile transferred to some innocent third party before the discovery was made. It is worth remarking that earlier drafts of the Bill suggested enactment by which the party entitled to avoid the contract is considered to have given evidence of an election to confirm the contract, unless within a reasonable time after he becomes aware of the fact entitling him to avoid it he gives notice to the other

party that he desires to avoid the contract. But the fact that this provision was dropped from the later drafts of the Bill shows that the question was intentionally left open.

§ 21. Reference was made in the preceding paragraph to the time at which the contract of insurance is concluded. The law provides that a contract of marine insurance is considered to be concluded when the proposal of the assured is accepted by the underwriter whether the policy then be issued or not, and for the purpose of showing when the proposal was accepted a reference may be made to the slip or covering note, or other customary memorandum of the contract, although it be unstamped.

In explanation of this provision it is necessary to state briefly the ordinary course of business in the negotiation of a policy of marine insurance.

The insurance regulations of most European countries compel the underwriter to prepare or issue a signed document expressing the contract: this document is known as a policy. Some of these regulations do not make the absence of a policy deprive the assured of the benefit of any agreement come to between him and the underwriter—this holds specially of Belgium. In France the majority of the decisions is said to be to the effect that a policy is essential for the purpose of proving the contract (that is presumably its intent and extent), but it is not essential for the purpose of giving the contract validity. It is difficult to see wherein can consist the value of a legally valid contract of whose contents evidence is not forthcoming, unless perhaps there are elements so essential to certain insurances that the mere existence of an agreement to insure certain matters or ventures implicitly involves the existence of certain distinct terms and conditions in any contract resulting from that agreement.

The English procedure in the offer and acceptance of a risk is unique. The broker usually offers risks by means of an abbreviated description of the risk in question called a *slip*. The underwriter signifies his acceptance of the whole or part of the venture exposed to peril by signing or initialing this slip, putting down the amount for which he accepts liability, or by signing and delivering to the assured

(whether principal or broker) a similar document made out in his own office called a *covering note* or *insurance note*. But these documents are merely first sketches of the contract—memoranda meant to serve as the groundwork of the contract in its final form, but so fragmentary and incomplete that they can only be explained when taken in conjunction with the complete text of the final contract.

Slips or insurance notes are of no legal value; they are not accepted in any English Court as evidence for anything but the date of the acceptance of a proposal to insure. But this is due merely to the fact that marine insurance policy duty has for many years been the source of a regular though small revenue to the Exchequer, and as this revenue is collected only by means of stamps on policies of insurance, the law provides that unstamped undertakings, like slips, shall not be regarded as in any way legally binding documents. Still slips and insurance notes are treated by the insuring public with the most jealous care. They are taken by the parties concerned as fixing the terms of contract so far as they are expressed in these documents, and although binding in honour only they are treated as provisional agreements to issue stamped policies on certain terms and conditions, on receipt of the information required for the issue of a policy in legal form.

An underwriter may be asked not whether he will accept a risk or part of a risk on conditions and at a rate named, but whether he will name the conditions and the rate on and at which he will undertake to cover the whole or part of a marine venture; in other words, the underwriter is asked by the broker to give a quotation. The mere quotation cannot be held to impose a legal obligation until its acceptance by or on behalf of the assured has been intimated. Consequently it is open to the underwriter to withdraw his quotation at any time before it is accepted. Generally in practice an underwriter may be expected to confirm within reasonable time quotations made to principals or agents (brokers), unless meanwhile exceptional circumstances have arisen, unexpected news has arrived, or the underwriter has already undertaken a risk on the venture from another offerer. But such confirmation of quotation

is a matter entirely of honourable and not of legal obligation.

Occasionally quotations have been made available for a stated period of time, usually a short period such as three days. In practice it has been found that a limitation expressed in this form implied that for that period the underwriter agreed to accept the risk on the conditions and at the premium he proposed. Consequently more recent forms of quotation note contain a clause of such form as the following: "Subject to acceptance within . . . and no risk until confirmed by us." This clause secures the underwriter freedom to withdraw his quotation at any time down to its acceptance by the assured.

THE POLICY

§ 22. The Marine Insurance Act prescribes that, "subject to the provisions of any statute," a contract of marine insurance, to be admissible in evidence, must be embodied in a marine policy in accordance with the provisions of the Act. The reference to the provisions of any statute indicates specially, if not solely, the provisions of statutes referring to finance, such as the various Stamp Acts and the Finance Acts regulating from time to time the raising of revenue by taxation levied on insurances. As has been stated above (p. 31), the absence of stamp proving the payment of adequate duty renders a document of marine insurance inadmissible, all that follows refers to inadmissibility on the ground of defect *in the document itself* as distinguished from the absence or insufficiency of stamp. It is provided that it is not necessary to execute or issue the policy of insurance as soon as the proposal of the assured is accepted by the underwriter, the law providing that the policy may be issued and executed either at that time—when the contract is regarded as concluded—or afterwards.

§ 23. Certain matters connected with the venture intended to be insured must be specified in any policy purporting to cover it :

- (i) The name of the assured or of some person effecting the insurance on his behalf.

- (2) The risk covered, that is, both the subject-matter insured and the perils insured against.
- (3) The voyage covered, or, in case of time insurances, the period of time during which the protection of the policy is to last; or if it is intended to cover not only a voyage but also a period of time, or a period of time succeeded by a voyage, then both must be distinctly specified.
- (4) The sum or sums covered.
- (5) The name or names of the underwriters.

§ 24. The wording of the preceding paragraph deals specially with the cases in which the insurance is accepted by individual underwriters, as, for example, underwriters at Lloyd's, and with regard to these it is enacted that when a policy is subscribed by or on behalf of more than one underwriter each subscription, unless the contrary is expressed, constitutes a distinct contract with the assured. In other words, the liability of each underwriter to the assured extends solely to the sum which he has put opposite his own name. The liability is several, not joint and several; or, as it is expressed in the old Lloyd's form, "We, the Assurers, are contented, and do hereby promise and bind ourselves, *each one for his own part*, our heirs, executors and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, etc., etc."

But when the insurer is not an individual trader but a corporation authorised to transact the business of Marine Insurance the policy must be signed on its behalf. It is permitted to such corporations to indicate their acceptance of the risk by the attachment of their corporate seal, but the Act does not enact that this is necessary. As a matter of fact, the Articles of Association of corporations transacting Marine Insurance operations contain the regulations stating what form of signature is necessary and valid for their policy, whether it be the signature of two directors, a director and an official, a director alone, or sometimes two officials. Some few companies also seal their policies, but this involves considerable extra labour and trouble, and not being necessary this course is very rarely adopted.

§ 25. Policies are divided into various classes :

- (a) Voyage Policies, in which the subject-matter is insured at and from or merely from one place to another place or places.
- (b) Time Policies, where the subject-matter is insured for a period of time definitely specified.

The law permits the inclusion in one policy of a contract of insurance for both voyage and time.

The earliest form of Voyage Policy employed in England covered the venture simply until the carrying ship arrived safely at destination. But in the policy on the *Tiger*, already referred to before, the risk was extended until the goods were at destination "discharged and laide on Land in good salfety." In modern voyage policies on ships the insurance has been extended first to cover the vessel until the expiry of twenty-four hours after her arrival, and later (in order to give the shipowner the chance of insuring a new voyage before the old one had expired) until the expiry of thirty days after arrival or until sailing on next voyage, whichever event may first occur.

As regards Time Policies, the law prescribes a limit of twelve months to the duration of such policies. Any policy made for a longer period is invalid, unless the prolongation is such as is contemplated in the Finance Act of 1901, Section 11, by which the time insurance of a vessel whose policy expires when she is at sea may be prolonged until the time of her arrival in port. This is done by means of a continuation clause of a wording similar to the following :

Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided that previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium to her port of destination.

To legalise the use of a policy of insurance containing such a continuation clause, it is necessary to pay an extra stamp duty of sixpence. Some insurers go so far as to add a clause to the policy stating that an extra stamp duty of sixpence has been impressed on the policy for the continuation clause.

§ 26. It has been stated above that the Act demands specific information in respect of five points connected with

every marine venture for which a policy is issued. Regarding the second and the third, the subject-matter and the voyage insured, further particulars are given; the latter is treated at great length in a separate section of the Act. As to the former, it is provided that the subject-matter insured must be designated with reasonable certainty. The reason for this is that the underwriter must be in a position to know what the object insured is. It is not necessary to specify all the exact particulars which a complete description of the interest would contain, but the designation must be such as will make it clear what objects the underwriter has undertaken to insure. On the other hand, it is not necessary to specify in the policy the nature and extent of the interest of the assured in the subject-matter insured: but it is submitted that in some cases the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it might be safer to state it. This holds particularly for insurances on bottomry and respondentia, which have always been regarded as a particular species of insurance.

The Act goes on to prescribe that where the policy designates the subject-matter insured in general terms it shall be construed to apply to the interest intended by the assured to be covered. The only meaning that can be fairly attached to this clause as it stands is that when after the completion of an insurance a difference has arisen between the assured and the underwriter regarding what has actually been covered, then if the looser description given in the policy fairly includes the more specified interest which the assured claims he intended to cover, the underwriter will be held to have in fact insured this more specified interest.

Finally, it is provided that in the designation of the subject-matter insured regard shall be had to any prevailing usage.

§ 27. Policies are further divided into :

(a) Valued Policies.

(b) Unvalued Policies, sometimes called Open Policies.

(c) Floating Policies.

(a) A Valued Policy is one which specifies the agreed value

of the subject-matter insured. It is necessary to keep quite distinct from one another the agreed value of the subject-matter insured and the amount insured upon that subject-matter. As has been seen in dealing with the underwriters on a policy, each underwriter may insure only a portion of the value of the object insured, and there is no guarantee by the assured that the whole or any particular portion of the subject-matter is insured. Thus the agreed value in a policy may considerably exceed the value insured by that policy. But in the absence of fraud, and subject to the later provisions of the Act, the value fixed in the policy is conclusive for the purposes of the policy between the underwriter and the assured whether the loss for which claim is made be total or partial. To this rule there is one exception, which will fall to be considered hereafter, namely, the case of Constructive Total Loss.

§ 28. (b) It is, however, open to the assured to insure for a definite sum his interest in the subject-matter of the policy without stating any value attributed by him to that subject-matter. A policy of this nature is termed an Un-valued Policy. The law prescribes that the value insurable is left to be subsequently fixed in agreement with the provisions specified for the fixing of insurable value. The clause of the Act embodying this provision further enacts that this fixing of the insurable value shall be subject to the limit of the sum insured. What does this mean? Does the "sum insured" mean the sum covered on one particular policy or on the whole of the policies dealing with the subject-matter of the insurance? Does the phrase "subject to the limit of the sum insured" mean that the sum insured (whether it be that of any one policy or the whole set of policies) is to be the maximum of the insured value or the minimum? If it means the maximum, then the underwriter may be held to be covering a larger proportion of the venture at risk than his amount insured bears to the actual value. If it be the minimum, then the underwriter may be insuring on a valuation, that is in excess of the actual value, and therefore will have received premium on an amount of risk which he has not run. It would have been simpler to omit all reference to the limit of the sum

insured and prescribe that excessive insurance should be reduced to a *pro rata* proportion of legal insurable value, while insufficient insurance should be treated as an indication that the assured meant to assume for his own account the difference between the total amount insured and the legal insurable value. (See § 81, p. 186.)

§ 29. (c) A Floating Policy is one in which the wording is made wide enough to cover the insured interest by whatever ship or ships, steamer or steamers, it may be shipped, the interest itself being either specifically described or expressed in language broad enough to include the various classes of insurable property which the assured wishes the underwriter to cover. It would appear that originally only the ships were left to be specially designated at a later time, whence floating policies were in earlier days known as "Ship or Ships" policies, or policies *in quovis*. But in mercantile practice it was found desirable to leave open for later designation not only the carrying vessel but also the class of goods shipped and within certain specified limits the ports of shipment and of destination. It is therefore quite common for the business of merchants to be covered by policies on merchandise (or manufactured goods, or metals, or grain and seeds, as the case may be) by steamer or steamers to be hereafter named from port or ports in the United Kingdom and Continent of Europe between Bordeaux and Hamburg, both included, to port or ports in South Africa or North America (as the case may be). A floating policy of this kind is usually open for a large sum, but care is taken by the underwriter to state in the document a sailing date up to which insurance under it is available. This is merely a prudent commercial arrangement by which the underwriter protects himself against the perils of a contract of this kind remaining long unexhausted, and therefore possibly being forgotten. In consequence of the contract not being defined or closed by the immediate naming of all the ships, interests, and voyages that will eventually be protected by it, Floating Policies have also been called "Open" Policies, a name which has unfortunately also been applied occasionally to Unvalued Policies. The condition underlying the issue and acceptance of a

floating policy is that within the limits of amount prescribed in the policy for each individual venture the assured binds himself to declare to the underwriter, and the underwriter binds himself to accept from the assured every venture falling within the scope of the floating policy—that is to say, every venture on interests which can be included in the description of the subject-matter given in the policy, shipped on such vessels as are described in general terms in the policy, and for voyages between ports within the general limits specified in the policy. The detailed description of every single venture as sent in by the assured to the underwriter is called a "declaration," and although it is not legally necessary that the declaration must appear in writing on the policy, it has been found so convenient to have the ventures endorsed on the policy in the order in which they are declared that this has now become in England a universal practice. In America the course of business is somewhat different. A floating policy is taken out and signed by the underwriter and is put on file; the assured makes his declarations in the shape of "applications" for insurance, which are also put on file, but the declarations are never in the writer's experience endorsed on the policy. This divergence in practice is solely the result of the difference in fiscal regulations. The English floating policy is issued for a definite amount, against which declarations are made, and on which stamp duty has to be paid; the American floating policy is only limited by an amount per bottom, and as no stamp duty has to be paid it is not necessary to fix the aggregate amount to be covered by the policy. The true English equivalent of the American floating policy is the open cover, which is neither more nor less than a slip or insurance note devoid of stamp, signed by the underwriter, stating what amounts he will insure on specified classes of vessels, on interests designated, and for voyages named more or less in detail, on certain conditions and at rates indicated for sailings between defined dates. This, being an unstamped document, cannot be sued upon in a court of law, but it is an honour document, to which the most scrupulous adherence is expected and is in fact given. Declarations of individual ventures under such a contract

are not entered as endorsements on the cover, but appear in the shape of separate stamped policies issued for each individual risk as it comes forward. But the floating policy being for a definite amount, it is necessary to apply special rules as to the values declared under it. The values must be honest values, but should a genuine mistake be made in the amount of the declaration it is open to the assured even after loss, damage, or arrival to rectify any erroneous declaration. On consideration of the fact that the value stated in a floating policy acts as a limit to the responsibility of the underwriter it is obvious that some provision must be made for the order in which the declarations are to be sent in, otherwise there might be uncertainty whether at the time of the declaration the policy was still open for an amount sufficient to cover an interest declared. It is therefore enacted that in the case of goods not only must all consignments within the terms of the policy be declared, but also that, unless otherwise provided in the policy, the declarations must be made in the order of despatch or shipment. As a matter of practice it has become common for merchants to take out two or more floating policies, each to follow and succeed its numerical predecessor, the merchant in this way avoiding the risk of finding himself with a large accumulation of declarations without an undeclared amount on his open policy sufficient to cover them.

In case of a declaration not being made before notice of loss or arrival, the Act prescribes that, unless the policy otherwise provides, the policy shall be treated as an unvalued policy as regards the subject-matter of that declaration. The effect of this is to limit the amount insured to the prime cost of the goods plus the expenses of and incidental to shipping and the charges of insurance upon the whole, thus depriving the assured of the recovery of any profit he might have declared under the open policy. From the nature of the remedy in this case it appears evident that the provisions contemplated as possibly existing in the policy must be provisions specially dealing with declarations belated until after notice of loss or arrival.

§ 30. As to the form of a Marine Insurance policy the law does not prescribe anything, but gives permission to

use the form in the first Schedule of the Act, which is the form of policy usually known as Lloyd's policy. But although the Act does not prescribe a policy form there is no doubt that the scheduling of Lloyd's form of policy will help to perpetuate the impression that this is the only form of words in which it is safe for an English merchant or ship-owner to accept, and an English underwriter to grant insurance. A fixed form of policy offers the great advantage to both parties of securing a certainty of agreement regarding the signification of terms employed in it, and the consequent stability that is needed in the form of a contract of such importance. But when one considers that the Lloyd's policy is comparatively little altered from the London policy of 1613, it may be questioned whether there has not been a serious sacrifice of flexibility and adaptability made for the sake of holding on to traditional certainty. Judges have at various times described the wording in expressions of severe disapproval. Lord Mansfield spoke in 1757 of the "ancient and inaccurate form of words in which the instrument is conceived." Other judges have remarked on the wonder that policies should be drawn with so much laxity; one has gone so far as to say that "the Lloyd's policy is an absurd and incoherent instrument." It therefore appears to be most regrettable that opportunity was not taken to give at least one modern policy form in the Schedule of the Act as an alternative to the well-worn and severely criticised policy form that is there reproduced. There is the less excuse for not doing this in that the Act provides that subject to its other provisions, and unless the context of the policy otherwise requires, the terms and expressions contained in the old form of policy given in the Schedule shall be construed as having the scope and meaning attributed to them in the rules for construction of policy attached to that form. The only restriction made is that the policy so interpreted must be "in the above (*i.e.* Lloyd's) or other *like* form." How far this restriction would go it is difficult to say. In the course of the discussions preliminary to the consideration and passing of the Marine Insurance Act there was, as far as the writer has been able to learn, only one alternative form proposed.

But so far no underwriter or Marine Insurance Company has adopted it, the newcomers into the business being as afraid apparently of abandoning precedent or of frightening the assured by novelty as the underwriters and corporations that have continued the traditional form for well over two hundred years.

§ 31. There is one element essential to the business of Marine Insurance but not legally necessary to be specified in the policy, namely the premium or consideration in return for which the underwriter takes the burden of the risk of the venture. The only cases in which the Marine Insurance Act provides for the fixing of the premium are those in which an insurance is effected at a premium to be arranged, or an additional risk is agreed to be covered at a premium to be arranged in case that risk is actually incurred. In such cases the Marine Insurance Act provides that when no arrangement is made then a reasonable additional premium is payable.

DOUBLE INSURANCE

§ 32. In close connection with the questions of insurable interest and subjects of insurance lie the problems which arise from the insurance of the same interest twice or several times over with the same or different underwriters. The cases of multiple insurance that most generally occur are those in which buyer and seller, shipper and consignee, and others in similar relationship have each insured the same goods or interest without knowing that the other had done likewise. The Marine Insurance Act provides that where several policies on the same venture and interest (or any part of it) are effected by or on behalf of the assured, and the aggregate amount of these policies exceeds the insurable amount as laid down by the Act, the assured is said to be overinsured by double insurance. In case of such over insurance the following provisions hold:

- (i) Unless otherwise provided in the policy, the assured may claim payment from underwriters in whatever order he chooses so long as he does not claim an

amount in excess of the indemnity allowed by the Act.

- (2) In the case of a valued policy the assured cannot claim without taking into account, as against the valuation, any sum received by him under any other policy on the same subject-matter without regard to its actual value.
- (3) In the case of an unvalued policy he must similarly take into account as against the legal insurable value any sum received by him under any other policy.

If the whole of the insurance on any subject-matter is done on unvalued policies, or on policies which all agree in the matter of valuation, these rules are quite easy of application and are easily understood. But if, as sometimes happens, certain of the insurances are done on the same valuation and others on a different valuation, it is obvious that care must be taken by the assured so to arrange the order in which he makes his claims that he does not place himself in the position of not being able to recover the full amount of his loss. The following instance is given by de Hart and Simey (*Marine Insurance Act, 1906*, p. 40): "If a ship be insured by policy A for £2000 and valued at £4000, and by policy B for £2000 and valued at £3000, and there be a total loss, the assured can recover £2000 on policy B and then claim £2000 on policy A, but if he first receives from the underwriters on policy A £2000, the sum insured by that policy, then he can only claim on policy B the difference between £2000 and the amount of the valuation (£3000), i.e. £1000."

When the assured on the collection of his various insurances on policies of various insurance has received any sum in excess of the indemnity allowed by the Insurance Act, such sum is considered to be held by him in trust for the underwriters according to their right of contribution among themselves. The law does not state the principle upon which this distribution shall be made, but it is reasonable to think that it must be in proportion to the liabilities of each separate underwriter with regard to the kind of loss or claim made on his policy by the assured.

As the law provides that there shall only be in the end

a single payment of the insured value, even when that value has been covered more than once, it is natural to expect that there will be regulations regulating the adjustment and eventual return of premium so that the liability for premium will be limited to one payment of the same. This question will be discussed later under the heading of "Return of Premium."

WARRANTIES, ETC.

§ 33. It is unfortunate that in the language of English Marine Insurance the word "warranty" is used to denote two entirely different things.

(1) It sometimes denotes stipulations which are exceptions to the general terms of the contract, by which the underwriter is to be exempted from certain risks either wholly or in part. For instance, the clause customary in English Marine Insurance policies by which liability for partial loss (Particular Average) is limited is often called the Free of Particular Average Warranty (F.P.A.). The reason for designating the clause by the word warranty arises from the fact that in the English policy form clauses exonerating the underwriter from certain liabilities ordinarily begin with words, "Warranted free from." This is the looser sense of the word warranty.

(2) In the stricter sense a warranty in a contract of Marine Insurance is *either* a condition stated in words in the policy on the exact correctness of whose purport or the exact fulfilment of whose undertaking or condition the validity of the contract depends, *or* a fundamental essential factor or condition inherent in each and every contract of marine insurance without exception.

Another curiosity in the stricter sense of the word warranty in Marine Insurance is that the kind of covenant embodied therein is in every other branch of the Law of Contract termed a "Condition," the word "warranty" being in those other branches of the law used to denote an independent subsidiary contract, breach of which does not entitle the offending party to avoid or rescind the contract but only to take action for breach or set-off.

With these explanations in mind it will be more easy to understand the provisions of the section of the Marine Insurance Act respecting warranties. A warranty is declared by the Act to be a *promissory warranty*, that is one by which the assured guarantees that some particular thing shall be done or not be done, or that some conditions shall be fulfilled, or affirms or denies the existence of some particular state of facts. Although stated to be of a *promissory character* and thus at least suggesting its existence in the form of a definite statement, a warranty is nevertheless express or implied. In other words, it may be either a factor in the bargain definitely set out or it may be something implicit in the bargain, an imminent factor of such absolutely controlling nature that its expression is unnecessary, in fact superfluous. Whether express or implied, it is a condition which must be complied with, absolutely and completely, even though the condition expressed by it is immaterial to the risk. If it be not complied with, then from the moment of the breach of warranty the underwriter is discharged from all liability on his policy, but for all liability incurred before that date he still remains responsible.

§ 34. But there is no compulsion on the underwriter in case of a breach of warranty to enforce his rights as respects non-liability. He is by law entitled to waive the breach. On the other hand, if once a breach of warranty has occurred, the fact of a later remedy of that breach, and consequent fulfilment of the warranty, is of no avail to the assured as a defence. If the warranty is once broken it rests entirely with the underwriter to decide whether he will insist upon his rights or waive them. There are circumstances in which a warranty ceases to be applicable to the contract (for instance, warranties referring to *convoy* during a state of war cease to be applicable and enforceable as soon as peace is reached); in such cases compliance is not insisted upon.

§ 35. No covenant can amount to an express warranty unless it is embodied in writing or printed upon the policy, or is contained in some document incorporated by a reference with the policy. There is no prescribed form of words in which an express warranty must be stated, but any form of words may be used which indicate the intention to

warrant. The word "warranted" need not appear at all, and all the effect and force of warranty may be contained in one single word, for instance in the use of a proper adjective describing a vessel's nationality. Similarly the words "with convoy" or "without convoy" are from their nature warranties, and the specification of the armament of a vessel or her equipment is considered equivalent to a guarantee that she is actually so armed and equipped as described. There was at the end of the eighteenth and the beginning of the nineteenth centuries a great mass of litigation respecting warranties, and as the cases and decisions date mainly from that period they are mostly connected with nationality, equipment, neutrality, convoy, and sailing date, which accounts for the fact that the Act of Parliament deals expressly with neutrality and nationality.

§ 36. As to neutrality, it is provided that where ships or goods are warranted neutral the effect is that at the commencement of the venture the property in question is actually neutral, and that so far as lies within the control of the assured it remains so during the whole course of the risk. The reason for this is obvious. A merchant shipping goods makes a bargain with the shipowner for their carriage, but he has no means of controlling the shipowner or his agents or employees in their disposal of the ship. By giving an absolute warranty of neutrality he will be giving a guarantee of something beyond his control. In the same way a shipowner might find himself in some way involved by a transfer of the property he is carrying from the flag to which it originally belonged to some other on a less friendly footing to that to which the carrying ship belongs. It is therefore necessary to make on behalf of the shipowner a mitigation of the absolute sense of a warranty of neutrality.

Consideration of questions of neutrality at once lead to the reflection that where the question of neutrality becomes of importance it is equally important to have conclusive evidence of neutrality in a clear and immediately presentable form. It is therefore a further implied condition in warranties of neutrality that so far as the assured can control the matter, a ship warranted neutral shall have on board the official documents necessary to establish her neutrality.

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There is further the implied condition that she shall not falsify or suppress her papers or use false papers. In case of loss arising through the breach of any of these conditions the underwriter is entitled to avoid the contract if he will.

§ 37. In connection with questions such as have just been discussed it is specially provided that there is no implied warranty regarding the nationality of a ship, or that her nationality will not be changed in the course of a risk. The exact application of this is at first rather difficult to see, but it will be found to mean that no deduction regarding nationality drawn from the name of the vessel or any description of her material or rig will be regarded as an implied warranty that she actually does belong to the nation whose ships are characterised by such names, such material, or such equipment, while the second provision above named leaves open to every assured, who does not in his insurance specify the nationality of the vessel he is employing, to have a change of nationality of the vessel made in the course of a voyage without involving him in any hazard he did not have at the commencement of the voyage.

§ 38. On one special form of warranty that a ship is in good safety and is well on a particular day, the Act reproduces the decision of a case of 1789, in which it was decided, namely, that it is sufficient if this safety exists at any part of the day, even though at a later hour the vessel is in peril or even lost. Similarly warranties to sail are presumably fulfilled at any time of the day the sailing occurs, although this case is not specified in the Act.

The warranties dealt with in the foregoing paragraphs are express warranties. Before proceeding to deal with the implied warranties it is necessary to notice the provision (§ 35, 3) by which it is decided that an express warranty does not exclude an implied warranty unless it is inconsistent therewith. The best instance that can be given of the application of this clause is one in which the fulfilment of the exact conditions of the expressed warranty would still leave the vessel different from or inferior to what is demanded by one or more of the implied or unexpressed warranties, such as seaworthiness. For instance, the

stipulation that a vessel shall before leaving on a certain voyage be found to satisfy the requirements of a named surveyor or registry may be fulfilled, and yet, should the vessel fail to attain the character of seaworthiness, the non-fulfilment of the latter implied warranty is not in any sense condoned by the complete fulfilment of the former warranty. So the final effect of this provision is that when an express warranty and an implied warranty deal with the same aspect of a vessel's character and qualifications, the more stringent of the two warranties will be upheld by the law as embodying the standard required in the transaction.

Turning to implied warranties, these can be deduced from the three great conditions which English law insists on finding present in every marine venture before it will enforce insurances made thereon, viz. :

- (1) That the vessel in which the venture is made is seaworthy.
- (2) That the traffic in which the venture is made is not illegal.
- (3) That the venture insured is carried out without deviation.

§ 39. (1) The law provides that in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular venture insured. It is to be noticed that seaworthiness is demanded by the implied warranty to be an attribute to the ship when the voyage commences, but the standard imposed depends upon the particular voyage in which the vessel is to be employed. From this it follows that if a venture begins (as is, in fact, usually the case) when the carrying vessel is lying in port the warranty is not fulfilled unless at the commencement of the risk the vessel is fit to encounter the ordinary perils of the port. The test of seaworthiness imposed by statute on a vessel sent on any particular voyage is that she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured. This introduction of the adventure insured as a factor in seaworthiness shows that seaworthiness is not measured by an absolute standard : it is, in fact, a

variable expressing a relation between the state of the ship and the perils it has to meet in the situation it is in. The statute does not define the different elements that go to make up seaworthiness nor their relative importance, but there are at least six points that have to be attended to in order to secure the attribute of seaworthiness.

- (a) The vessel's fabric must be fit as far as a vessel of the kind can be.
- (b) Her gear must be sufficient in quantity and quality.
- (c) She must be competently commanded and officered and fully manned.
- (d) She must be properly provisioned.
- (e) She must not be overloaded.
- (f) If a steamer, she must be adequately supplied with fuel.

Consideration of these requirements at once shows how diverse the standards are for a short coasting voyage, for a long trading expedition, for a winter North Atlantic voyage, and for a Mediterranean cruise. Even in the course of one venture there may be stages in which the ordinary perils reasonably expected to be encountered differ in intensity considerably. It is therefore specially provided that in case of such a voyage in different stages during which the ship requires different kinds of preparation or equipment, or additions to its preparation or equipment, the requirement of seaworthiness will be fulfilled when at the commencement of each stage the ship is seaworthy in regard to such preparation or equipment for the purposes of that stage. The classical instances of voyages divisible into stages of the above kind are :—First, of a vessel going on a whaling voyage, in which the warranty of seaworthiness is held to have four gradations: “Fit for dock at London, fit for river to Gravesend, fit for sea to Shetland, fit for whaling”; second, of river steamers sold from Lyons to owners on the Danube: these vessels descending the Rhone must be seaworthy for the Rhone, and from Marseilles to Galatz they must be seaworthy for the Mediterranean and Black Sea. Of course it is obvious that if the severest and most exacting part of the voyage is at the very commencement the fulfilment of the warranty at the commence-

ment of the venture carries with it implicitly its fulfilment for all the other stages. Connected with this warranty of seaworthiness in stages is the question of sufficiency of fuel taken by steamers at coaling or oiling ports in the course of their voyage. Take the instance of a voyage from the Philippine Islands to Liverpool. There are several points at which it is customary to take further supplies of fuel—Labuan, Colombo, Perim, Suez or Port Saïd, Malta or Algiers, Gibraltar. An instance has occurred in which it was intended to take at Colombo sufficient fuel to bring the steamer to Suez, but the supply taken on board was insufficient, and owing to the negligence of the engineer this was not brought to the captain's knowledge until after they had passed Perim; the result was that in order to arrive at Suez some of the cargo had to be used as fuel, which gave rise to a claim against the shipowner for the value of the goods burned. It was decided that the steamer was unseaworthy for the stage between Colombo and Suez. In this matter of proper supply of fuel as in the other elements of seaworthiness there is obviously no absolute standard, as the sufficiency of the supply from stage to stage must naturally depend on the facilities for replenishment at the end of each stage. It is submitted that in the case of insufficiency of supply at the commencement of each stage the ship must be unseaworthy for that stage if she proceeds on it even in the hope of picking up a supply on the way. But there might be a hardship in this if the master's only choice is between sailing in this condition of short fuel and remaining in a position from which he sees no early opportunity of escape, or in which he may expect to meet dangerous weather or be beset with ice. The policies so far dealt with are voyage policies commencing at or from a port, that is, a place frequented by ships and therefore provided with facilities for their repair and outfit. But we have already seen that there are policies underwritten for periods of time. In practice there are thousands of insurances that commence with the year on 1st January or on 1st July or at noon on 20th February. When these insurances are effected the owner, in most cases, cannot possibly indicate where the vessel is likely to be when the current policy runs off and

the new policy attaches. It has therefore been found necessary to add to the provisions of the Act regarding seaworthiness that in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure. If no limitation were attached this provision would afford protection to any one sending a steamer insured on time to sea in an unfit condition. There is therefore added the following rider :

Where with the privity of the assured the ship is sent to sea in an unseaworthy state the insurer is not liable for any loss to be attributable to unseaworthiness.

§ 40. So far respecting unseaworthiness as regards insurances on ships (and freights) ; for the other great maritime interest, cargo or goods, the statute provides a somewhat different standard. In a policy on goods or other moveables there is no implied warranty that those goods or moveables are seaworthy.

The goods may be of such a nature that they cannot stand the vicissitudes of a sea voyage, and are therefore from the beginning almost certain to arrive in bad condition if they arrive at all. But this does not vitiate the insurance as regards perils insured against. For instance, a badly packed shipment of cigars from Havana is absolutely certain to arrive at a European destination in very deteriorated condition ; many wines will not bear transport even across the North Sea. But against perils of the sea such as sinking, stranding, and burning, the insurance of such merchandise holds good, the question of its inherent seaworthiness not being allowed to be brought up. On the other hand, it should be remarked that the underwriter against perils of the seas is free from all liability for such damage as arises from the inherent character or quality of the goods themselves, which is usually technically described as *vice propria*.

There is, however, a further complication. In a policy on goods it is not sufficient that the ship should be merely seaworthy as a ship at the commencement of the voyage. The cargo owner has imposed upon him by the warranty of seaworthiness the obligation that the vessel he chooses for the conveyance of his goods shall be reasonably fit to

carry these to the destination named in the policy. For instance, a steamer might be thoroughly suitable in strength, build, and equipment to carry cargoes of fruit from Spain to the United Kingdom or Atlantic ports of the United States, between New York and New Orleans, but not sufficiently strong or properly adapted for the carriage of a cargo of iron ore from Spain to the same destinations. In the former case the warranty of seaworthiness would be fulfilled in a policy on the cargo. In the latter it would not be. Similarly a vessel might be put into a trade in which the carrying of deck cargoes was customary, and might, owing to her construction, be not only technically but actually unseaworthy. On the other hand, a vessel might be built for a deck load trade with such arrangements of her decks and hatches as would make her completely unsuitable for any other trade. Take as extreme instances of the contrast a shade-decked or shelter-decked passenger steamer, absolutely unsuited for the carrying of an ounce of deck cargo, and the timber-carrying schooners of the coast of the United States, built with such shallow holds that the deck load is at least twice the size of the under deck load. Similarly a steamer from the River Plate might be in every respect strong enough and sufficiently equipped to carry to Europe or the United States a full cargo of grain or of wool, but she would certainly not be seaworthy for the carriage of a cargo of frozen meat unless she were further provided with properly arranged insulated, refrigerating chambers and freezing machinery, and sufficient permanent dunnage, etc., to enable her to carry this class of cargo. In a ship without these appliances such a cargo could not be considered even at the commencement of a voyage such as is described above, as loaded in a seaworthy vessel.

With regard to seaworthiness it is noticeable that the Act contains provisions solely about ship and cargo. But it often happens that either at the beginning or the end of a sea voyage the transit from shore to ship or *vice versa* is made in lighters. There is no reference in the Act to seaworthiness of lighters.

Further, it is worthy of remark that although the Act constantly speaks of the warranty of seaworthiness, the

shape which the matter takes in the course of business is that the enforcement of this warranty results, as far as insurance goes, in the underwriter attempting to avoid his policy by alleging, and if possible proving, the *unseaworthiness* of the ship in question. The difficulty of this proof is very great; in fact it is proverbial. The old rule was that it is only in cases where the fair presumption from the facts is that the disaster arose from causes existing at the time of sailing (*e.g.* vessel foundering shortly after sailing without any apparent cause sufficient to account for it), that it falls on the assured to rebut the inference of *unseaworthiness*, in other words to assume the burden of establishing seaworthiness.

LEGALITY OF TRADE

§ 41. The general principle lying behind the provisions of the Act on this point is that anything done towards the carrying out of what cannot be done without violating the law cannot be made the subject of a legal contract. Therefore if the occupation in which a vessel is engaged is illegal, or the trade in which she is regularly employed has become illegal, the law declines to enforce claims made on underwriters for loss or damage occurring in the course of such trade. Not only must the venture be a lawful one, but it must be carried out in a lawful manner, and if this is not done, in so far as the assured can control the matter, the implied warranty is broken. Illegality of trade must be understood in a somewhat limited sense. It must be a trade which is illegal as regards the laws of the United Kingdom. Foreign smuggling is not so regarded, nor is blockade running in time of war so long as the United Kingdom is neutral. The same holds of contraband of war. On the other hand, as soon as the United Kingdom is at war every traffic with the enemy is illegal, and consequently no insurance of any venture connected with such traffic is enforceable at law in England. Similar considerations have in the past led to the regulation that insurances of enemies' property against capture by British ships are not recoverable, *i.e.* they are not enforceable at law in England.

As an instance of the kind of case contemplated in the second part of this section of the Act we may cite the instance of an insurance on freight from a colonial port to Liverpool. The master, without the owner's knowledge, stowed part of his timber cargo on deck and sailed without a certificate from the clearing office, thereby breaking the law. Had the shipowner, the assured, given instructions that this was to be done, or connived at it, he would have broken the warranty of legality and his policy would have been void, but as the master did it entirely on his own account, being beyond the control of the owner, the validity of the policy was upheld, the adventure having been carried out in a lawful manner so far as the assured could control it.

DEVIATION. (3) This will come up for discussion under the heading of The Voyage.

THE VOYAGE

§§ 42 to 49. Before proceeding to describe the provisions of the Act dealing with The Voyage Insured it is well to consider what is generally meant by the word "*voyage*" and to consider what is involved in describing the transit between two points as a *voyage* from the one to the other. At first sight it would almost seem that the mention of the two end points is all that is essential, but on further consideration it is found that the manner in which the passage is made from the point of departure to the point of destination is hardly ever the same in any two cases. It varies with the kind of ship employed, the season in which the venture is undertaken, the weather met, the winds prevailing, the political circumstances of the seas which the vessel navigates, the state of peace or war obtaining between the nation to which the ship belongs and the other nations using or bordering the seas through which she passes. It is obvious, for instance, that the line traced by a steamer between any two ports varies hugely from that traced by a sailing ship, that the track made by a sailing ship which has the advantages of the monsoon differs from that of a vessel struggling against it ; and that the course of a vessel, whether sailer or steamer,

must in time of war be directed away from places where enemy ships may be expected. Consequently no definition of the word *voyage* can be reasonable which does not leave play for all the circumstances that surround the carrying out of a marine venture. Speaking generally, by the course at sea between any two ports is meant ordinarily the sea path over which the one can be reached from the other in the shortest time consistent with the safety and ordinary convenience of the things and persons involved in the venture, the special circumstances of each case being further considered: to use the words employed by the lawyers two centuries ago, the voyage insured (*viaggium*, from the more classical *viaticum*) named in the policy is a path at sea from the starting-point (*terminus a quo*) to the destination (*terminus ad quem*) in a course of navigation prescribed by custom (*iter viaggii*) with which the passage of the ship must correspond.

§ 42. The Marine Insurance Act provides that when anything is insured on a voyage policy, either "at and from" a named place or merely "from" that place, it is not necessary that the named vessel should be at that place when the insurance is concluded. But it is an implied condition that the adventure shall be commenced within a reasonable time, and that if it is not so commenced the underwriter may avoid the contract. This implied condition, however, may be removed if it can be shown that the delay arose from circumstances known to the underwriter before the insurance was concluded, or that he waived this condition.

The course of business would be very much hampered by any regulation which made it impossible to arrange for the insurance of a venture before the arrival of the ship concerned at the port at which the venture is to start. It might be that the amount of premium to be paid for the insurance of the ship and goods involved in the venture was so serious as to be a factor in deciding whether the venture was to go on or not. But in order that there may be no mistake about the circumstances and conditions in which the venture is to be made (for example, season and prevailing weather), it is laid down that the vessel must arrive at the intended starting-point

of the venture within a reasonable time after the insurance is completed. The trades to the St. Lawrence and Baltic, for instance, are so completely season trades that the difference of a few weeks in leaving Great Britain for these destinations involves greatly increased hazards at sea with the additional chance of damage by ice and the possibility, if not certainty, of long delay.

In the Rules for the Construction of the Policy given in the first schedule to the Act we find provision that where the subject-matter is insured "from" a particular place the risk does not attach until the ship starts on the voyage insured. In the case of the insurance of a ship "at and from" a particular place where she is at good safety at the conclusion of the contract, the risk attaches immediately. On the other hand, if she is not at that place when that contract is concluded, the risk attaches as soon as she arrives in good safety. If she is covered by another policy for a fixed time after arrival this is, unless otherwise provided in the policy, regarded as immaterial.¹

In the case of chartered freight practically the same provisions hold. The Rule of Construction 3 (c) is :

Where chartered freight is insured "at and from" a particular place and the ship is at that place in good safety when the contract is concluded, the risk attaches immediately: if she be not there when the contract is concluded the risk attaches as soon as she arrives there in good safety.

In the case of freight not chartered, payable without special conditions and insured at and from a particular place, the risk attaches *pro rata* as the goods and merchandise are shipped, a provision being added that on cargo in readiness for shipment belonging to the owner, or which some one has contracted with him to ship, the risk attaches as soon as the ship is ready to receive cargo.

The text of the Rule 3 (d) is as follows :

Where freight other than chartered freight is payable without special conditions and is insured "at and from" a particular place, the risk attaches *pro rata* as the goods or merchandise are shipped;

¹ To prevent the possibility of double insurance occurring in such a case, many underwriters and companies insert a clause: "This policy not to attach before the expiry of previous policies."

56 STARTING-POINT AND DESTINATION

provided that if there be cargo in readiness which belongs to the shipowner or which some other person has contracted with him to ship the risk attaches as soon as the ship is ready to receive such cargo.

The Rule 4 immediately following returns to the consideration of goods and reads as follows :

Where goods or other moveables are insured " from the loading thereof " the risk does not attach until such goods or moveables are actually on board, and the insurer is not liable for them while in transit from the shore to the ship. -

§ 43. Where the starting-point of the voyage is definitely named in the policy and the ship instead of sailing thence sails from any other place, the risk does not attach.

For instance, the risk on a vessel from Cardiff to Gibraltar is not covered on a policy stating the voyage to be from Liverpool to Gibraltar, even though the passage from Cardiff is the shorter of the two and is free from certain risks found in the earliest part of the voyage from Liverpool. Where the voyage described in the policy is shorter and easier than the one actually undertaken it would clearly be inequitable that the underwriter should bear the risk for the longer and harder voyage.

§ 44. Similarly, where the destination is named in the policy and the ship instead of proceeding to that destination sails for any other, the risk does not attach.

Here also it is immaterial whether the destination for which the vessel actually sails is nearer and more easily attainable than that named in the policy or more distant and more difficult of access.

Difficulties have arisen in the application of the legal regulation regarding destination, but these have generally occurred in connection with the declarations on floating policies, providing a more or less wide range of destination, and containing a deviation clause apparently providing for a change of voyage or destination. But the principle has been maintained that no deviation or change of voyage can be admitted as a valid variation of a voyage properly declared under the policy unless the new voyage substituted for the one originally covered is itself con-

tained within the scope of the description of the class of voyages insured. For instance, on a floating policy from the United Kingdom to Spanish ports west of Gibraltar and containing a deviation and change of voyage clause, no voyage can be declared to Spanish ports east of Gibraltar.

§ 45. A vessel is said to make a change of voyage when after the commencement of the risk her destination is voluntarily changed from that contemplated by the policy.

When there is such a change of voyage then, unless the policy otherwise provides, the underwriter is freed from all liability as from the time of the change, that is to say, as from the time when there is a manifestation of the determination to change it. The fact that at that time the vessel may not actually have departed from the course of navigation contemplated by the policy when the loss occurs, is immaterial.

The preceding paragraph enables us to make an important distinction between two cases in which the vessel remains on exactly the same track or course of voyage. For instance, take a sailer leaving the Thames for Australia, and insured on a voyage from London to Melbourne. Suppose that at the Cape de Verde Islands the Captain finds instructions to proceed to Bombay instead of Melbourne, it is obvious that this will not involve any change in the navigation of the ship until after he reaches the Cape of Good Hope. But if no alteration is made in the policies of insurance the loss of the ship between the Cape de Verde Islands and the Cape of Good Hope will not involve in liability any underwriter who insured her from the Thames to Melbourne.

The general liberty contained in most policies to "touch and stay" at any ports or places whatsoever does not without some special addition entitle the master to take his ship out of the proper course for his voyage between the port of departure and the port of destination. This apparently contradictory principle is embodied in Rule 6 for the Construction of Policy, viz. :

In the absence of any further license or usage, the liberty to touch and stay "at any port or place whatsoever" does not authorise

the ship to depart from the course of her voyage from the port of departure to the port of destination.

The explanation of the contradiction between the general words "touch and stay at any port or places whatsoever" and the restrictions embodied in this Rule is found in the fact that the permission to sail to and touch and stay is limited by the words of the policy "in this voyage," the word voyage being used here in a qualified and restrained sense so as to mean only places in the usual course of a voyage to and from the places mentioned in the policy (Lord Mansfield in *Lavabre v. Wilson*, 1779).

§ 46. It was mentioned in the introduction to the section that the word voyage contained a reference to a course of navigation prescribed by custom with which the ship's passage must correspond. Any departure from that course of navigation is regarded as the taking of a wrong track and is termed a deviation. There are certain lawful excuses given for deviation which will be specified later, but in every other case where a ship deviates from the voyage specified in the policy the underwriter is free from liability from the time the deviation occurs, and although the vessel may regain her proper route without accident, the underwriter's freedom from liability continues. There is considered to be a deviation when either

- (a) The policy distinctly specifies the course to be taken in the voyage and that course is not followed; or
- (b) The policy does not specify any particular course to be followed in the voyage, but the usual and customary course is departed from.

In deciding regarding deviation and its effect no attention is paid to the intention to deviate. It is immaterial. There must be an actual deviation to free the underwriter from his liability under his policy.

The consideration of deviation brings to light the third possibility in the way of alteration of voyage. If the vessel sails for a destination other than that for which she is insured, the policy never attaches at all. If the vessel sails for the destination insured in the policy but after commencement of the voyage proceeds to another destination there is a change of voyage, and the

policy lapses from the moment this change is determined upon. If the vessel sails to the destination named in the policy and never alters that destination, but in some part of the course of her navigation diverts from the course of the voyage, either prescribed in the policy or by use and custom, then there is a deviation and the policy is void from the time the deviation actually occurs.

§ 47. To provide for the not infrequent cases in which a vessel carries cargo to be delivered at different destinations, it is necessary at times to specify in the policy the several ports of discharge, and the ship may proceed to all or any of them. But she is bound to proceed to them or such of them as she visits in the order set out in the policy, unless there is a usage or sufficient cause to the contrary. If she does not visit them in this order, she is considered to deviate from the voyage prescribed in the policy.

Where the destination is not specified by the naming of ports but by the indication of an area within which the vessel is to discharge at ports which are unnamed, she must in the absence of any usage or sufficient cause to the contrary proceed to them (or to such of them as she visits) in their geographical order. If she does not she is considered to deviate from the voyage insured in the policy.

It does not appear from the text of the Act what would constitute a sufficient cause to the contrary, or whether there is any such sufficient cause not included in the lawful excuses which are specified in the Act two sections further down.

§ 48. Somewhat analogous to change of voyage and deviation, viewed in connection with the locality of the voyage, is delay, if unjustifiable or capricious, when viewed in connection with the time properly spent upon it. Consequently the Act provides in the case of a voyage policy that the venture insured must be carried out throughout its course with reasonable dispatch. If without lawful excuse it fails to be so carried out the underwriter's liability ceases as from the time when the delay became unreasonable.

This provision would prevent a captain or owner from

60 EXCUSES FOR DEVIATION OR DELAY

undertaking in connection with his voyage any subsidiary or occasional side venture tacked on to the regular voyage for which the vessel has been insured, provided, of course, that the said subsidiary employment is not included under one or other of the lawful excuses to be mentioned immediately.

§ 49. Deviation or delay in prosecuting the voyage contemplated by the policy is excused :

- (a) Where authorised by any special term in the policy ; or
- (b) Where caused by circumstances beyond the control of the master and his employer ; or
- (c) Where reasonably necessary in order to comply with an express or implied warranty ; or
- (d) Where reasonably necessary for the safety of the ship or the subject-matter insured ; or
- (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger ; or
- (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship ; or
- (g) When caused by the barratrous conduct of the master or crew, if barratry is one of the perils insured against.

When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage with reasonable dispatch.

By resuming her course is to be understood not that she actually harks back to her old track, but that she proceeds from the point where the reasonable excuse ceases to operate to her port of destination by the route which is the usual and customary course for vessels to follow from that point to that destination.

But delay may make itself known on a risk on goods or moveables not only in the period spent on the voyage between the port of loading and the port of destination, but also by the goods or moveables being left on board the vessel after her arrival at destination and before the commencement of discharge. It is therefore provided by Rule 5 as follows :

Where the risk on goods or other moveables continues until they are "safely landed," they must be landed in the customary manner and within a reasonable time after arrival at the port of discharge, and if they are not so landed the risk ceases.

ASSIGNMENT OF POLICY

The policy of Marine Insurance being one of the cardinal documents employed in oversea trade, it is essential that while it evidences primarily the contract between the assured and his underwriter, its benefits should be capable of extension for the protection of any one to whom the assured in the proper carrying out of the venture properly transfers his interest. Such a transfer is termed legally an assignment. The circumstances under which assignment is recognised by the law as legal and binding are detailed by the Act as follows :

§ 50. (1) Unless a policy contains terms expressly prohibiting assignment it is legally assignable and may be assigned either before or after loss.

The reservation made respecting policies containing terms prohibiting assignment arises from the fact that some American policies require the underwriter's assent as an essential preliminary to assignment. The assignment of a policy to a third person would not be of any value to that person unless there was also a transfer of the assured's property or interest in the thing insured ; but, presuming that that interest is properly substantiated, the fact that a loss has occurred before the assignment of a marine policy will not nullify or reduce the protection given by it. In such a case what is actually transferred by the endorsement is the assignor's interest in the claim which he is entitled to put forward under the policy.

§ 50. (2) When a marine policy has been assigned so as to transfer the beneficial interest in such policy, the assignee (that is the person to whom it is transferred) has the right of suing on the policy in his own name, leaving the original assured out of the action altogether.

On the other hand, the underwriter who would be the defendant in such an action is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by and on behalf of whom the policy was effected, that is, the original assured.

The defences above mentioned are limited to those

"arising out of the contract," that is, out of the contract of marine insurance as evidenced by the policy. There are thus excluded from the defences all such as deal with set off or other obligation of the assured to the underwriter not arising out of the policy of insurance forming the subject of the suit.

It is to be noticed that the transfer of an interest of the assured to a third party does not necessarily involve the transfer of the insurances on that interest, and should an insurable interest be thus allowed to lapse it cannot be revived even although an assignment is made by the original assured.

§ 50. (3) A marine policy may be assigned by endorsement thereon or in other customary manner.

Endorsement does not from the wording of the Act appear to be compulsory, and no indication is given in the law of any other method in which assignment may be evidenced. So far as the ordinary practice in England is concerned practically no other method but that of endorsement is employed. The absence of an endorsement on a policy or certificate of insurance handed in by an assignee to an underwriter would certainly be remarked on, and refusal to endorse might be followed by such inquiry respecting the interest concerned, its ownership, etc., etc., as might tempt the assignee to refuse to accept an unendorsed insurance document. The longer form of assignment given in the Act of 31 & 32 Vic. has never once been seen by the writer in the course of thirty years' practice.

It was observed above that the transfer of an interest of the assured to a third party does not necessarily involve the transfer of the insurances in that interest. It might also happen that the assured had lost his interest in the subject-matter insured: this might occur by the delivery of the interest into the custody or possession of some one else, which delivery transferred the property in the goods. It is therefore provided that :

§ 51. Where the assured has parted with or lost his interest in the subject-matter insured, and has not, before or at the time of so doing,

expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative;

Provided that nothing in this section affects the assignment of a policy after loss.

THE PREMIUM

The consideration in return for which the insurer grants the protection of his policy to the assured or his agent against the perils named in that policy as far as they affect the subject-matter insured, is called a premium. Although the premium is stated in the policy as a definite sum per cent it is found in practice that it is subject to certain rebates. A very nearly universal practice in England is to deduct five per cent brokerage and ten per cent discount, the latter being allowed when payment of the premium is made on or before a named date, usually the eighth of the month in London, and the tenth in Liverpool and other provincial towns. In cases in which an insurance is effected through a broker he renders to the assured his account for the premium, the only deduction made being the discount. The result is that when the assured pays the broker's account and the broker pays the underwriter's account, the brokerage, being the difference between them, remains in the broker's hands.

§ 52. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the underwriter to issue the policy to the assured or his agent, are concurrent conditions, and the underwriter is not bound to issue the policy until payment or tender of the premium.

Is there not the possibility of some difficulty in reconciling this clause with clause 21 of the Act, which defines the time when the contract is due to be concluded? Or may it be said that while the contract may have been concluded by the underwriter's acceptance, that refers solely to the fixing of the terms and conditions, but the transaction remains ineffective until the assured and the underwriter discharge their concurrent respective duties of paying or tendering the premium and issuing the policy?

It becomes important for the underwriter in the case of

64 LIABILITY FOR PREMIUM: BROKER'S LIEN

insurances done through a broker on behalf of a named assured to know to whom he is to look for payment of the premium, and to whom he will have to pay losses or return premiums if any. It is therefore enacted as follows :

§ 53. (1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly liable to the underwriter for the premium, and the underwriter is directly responsible to the assured for any amount payable in respect of losses or in respect of returnable premium.

The broker being thus made responsible for the premium incurred by him on behalf of a third party, it remains to be seen what security is given to him by the law for his repayment by the assured.

§ 53. (2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy ; and, where he has dealt with the person who employs him as principal, he has also a lien upon the policy in respect of any balance on any insurance account which may be due to him from the same person, unless when the debt was incurred he had reason to believe that such person was only an agent.

In the foregoing paragraph the broker is provided by the law with a lien on the policy for the amount of the premium and charges such as brokerage. He may consequently hold the policy as his security until the assured pays the premium and charges to him. If the relations of assured and broker are not confined to a single risk, but they are in the habit of regularly transacting business with one another, then he has a lien on the policy for the balance due to him on any account between them referring to insurance transactions only. But there are several practical difficulties arising in connection with this lien. For instance, a merchant insures through a broker a number of cargoes by named steamers, a separate policy being taken out for each steamer. The merchant gets into difficulties and the estate is handed over to a liquidator. The liquidator tenders to the broker payment of premium for all the ventures then at sea, but declines to make any payment on account of the policies on the ventures which are run off,

these having all arrived safely. The broker having paid premium on the whole of the policies declines to receive the amount tendered, and is met with the threat that if he does not accept it and hand over the corresponding policies the liquidator will refuse to take up any of those policies and insure elsewhere on his own account the risks which are then at sea. In the end the broker accepts the liquidator's terms. The same thing might occur with a single risk; payment might be so long delayed that the venture had already run off in safety. It is apparent that the broker's position in such matters is better secured by the employment of a floating policy for a large amount rather than separate policies by named ships: for the chances are, that to be put in possession of the insurance of the ventures still at sea the parties interested would pay the premium on the whole policy, even though that included many run-off risks. It has also happened within the writer's knowledge that a broker in England, effecting insurances for another English broker acting on behalf of a foreign firm, exercised his lien on the policies effected for that firm. There were twenty policies, the premium on all of which had been paid by the assured to the first broker while the first broker had paid the second broker premium on only six of these. The second broker paid the underwriter the premium on the whole twenty. Action was brought by the foreign merchant to recover the marine policies which were detained by the second brokers. They delivered up the six on which premium had been paid to them, but claimed as to the other fourteen that they had either a general lien or a particular lien, because they had not been paid the premiums on these particular policies. The six policies given up were delivered without prejudice to the lien on those retained, which the second broker claimed to hold, each for all or all for each, so that even if the merchant paid the premium on one the second broker was still entitled to hold that one until the premiums on the others were paid. The judge held that as all the policies were part of one transaction the second brokers were entitled to hold them all for the premiums due to them, although the wording of the section of the Act seems to confine the lien to one single

66 EFFECT OF RECEIPT CLAUSE IN POLICY

policy. But the broker's general lien, above described, exists only where he does not have reason to believe that his employer was himself merely an agent.

The older form of English Marine Insurance policy contains an acknowledgment that the underwriter has been paid the consideration due to him for the insurance, whereas the newer form speaks merely of the person or persons effecting the policy promising to pay the sum of . . . as a premium. There is consequently a different obligation under these two forms, and the following special provision has been made in the Act with respect to policies in the older form :

§ 54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the underwriter and the assured, but not as between the underwriter and the broker.

The object of this clause is to protect an innocent third party, in this case the assured. As there is no liability on his part to the underwriter for the premium incurred by the broker on account of the insurance of his interest, he ought not to be damned by the broker's failure to pay the premium which is due by him to the underwriter. The broker, as we have already seen, has his lien on the policies against the assured. Consequently, as the law stands, whether the assured has paid the broker or not, policies containing the acknowledgment clause are conclusive between the underwriter and the assured, but not between the underwriter and the broker. What would happen suppose the assured were dealing direct with the underwriter ? He would in that case occupy the same position towards the underwriter as is usually taken by the broker. If the acknowledgment in the policy is not taken as conclusive in this case between the underwriter and the assured, it ought surely in equity be made conclusive in this case as between the underwriter and any innocent third party, such as an assignee for value without notice.

The occurrence of the words "absence of fraud" indicates that if credit for premiums be obtained by fraud, either on

the part of the assured or of the assured and the broker jointly, the acknowledgment is not conclusive. .

RETURN OF PREMIUM

§§ 82-84.

Before proceeding to the consideration of Loss and Abandonment, Partial Losses, and Measure of Indemnity, it appears more convenient to take up at this point the questions connected with the return of premium. It is true that in practice returns of premium are treated in settlement as if they were claims for losses, yet they are in character so distinct from other claims that it is more convenient to treat them at once as being the subject of the second part of the Law of Marine Insurance regarding premiums.

In consequence of the provisions made in the Act by which the liability for premium rests with the broker, it was found necessary to discriminate between paid and unpaid premiums, and between returns on policies on which the premium has been paid and those on policies on which the premium has not been paid. The provision stands as follows :

§ 82. Where the premium, or a proportionate part thereof, is, by this Act, declared to be returnable,—

- (a) **If already paid, it may be recovered by the assured from the underwriter ; and**
- (b) **If unpaid, it may be retained by the assured or his agent.**

By paid and unpaid are meant in the preceding paragraph paid *to the underwriter* and unpaid *to the underwriter*. Consequently, if the assured gets his policy from the broker without paying him the premium on it, and the broker pays a premium to the underwriter, the assured is then in a position to claim legally direct from the underwriter any returns due on the policy. To obtain these returns he must have possession of the policy, so that if the insurance in question is a solitary transaction the broker may be left without any policy in hand upon which he can exercise his right of lien.

§ 83. Where the policy contains a stipulation for the return of the premium, or proportionate part thereof, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured.

In practice the treatment of returns is not so simple as this appears to make it, the fact being that many of the returns specially provided for in the policy depend on the occurrence of two events, the one of them very frequently being the arrival of the ship at destination. For instance, in many time policies on steamers the lying-up returns are made dependent on the vessel attaining the close of the period covered by the time policy on which she is insured. This is expressed by the apparently irrelevant addition of the words "and arrival" at the end of the return clause.

But the law deals not only with returns of premium for which special arrangements have been made, but also with returns prescribed by it for failure of consideration. For just as it is a part of the law that there can be no legal contract to do anything without the actual passing of a consideration between the parties to the contract, so it here enacts that if for any except certain named causes the risk which the underwriter contracts to carry does not come off wholly or partly, he shall be obliged to return the whole or part of the premium he has received. This provision is expressed in the Act in the following form :

§ 84. (1) Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured.

(2) Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, under the like conditions, thereupon returnable to the assured.

The question of the divisibility (or apportionability) of the consideration for the payment of premium is, of course, a question of fact and involves some certainly very delicate considerations. There cannot be many cases in which it is clearly expressed in the policy that there is a divisibility in the venture ; there are certainly very few cases in which

there is nowadays a custom of treating a voyage out and home as divisible. It is submitted that in a time policy there is no divisibility as regards the period of time covered. In other words, there is no return for the period of insurance unexpired at the time of a vessel's loss, and it is absolutely certain that there is no custom contravening this statement. On the other hand, where a return has been agreed for specific employment in a particular trade "during the whole currency" of a twelve months' policy, and the vessel was lost before the expiry of the twelve months, it was held, prior to the passing of the Marine Insurance Act, that "the currency of the policy" expired when the ship was lost, and that the return was legally claimable. It appears to be doubtful whether the same judgment would be given now.

The Act makes special provision for the following cases :

§ 84. (3) In particular—

- (a) Where the policy is void, or is avoided by the underwriter as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured ; but if the risk is not apportionable, and has once attached, the premium is not returnable :
- (b) Where the subject-matter insured, or part thereof, has never been imperilled, the premium, or, as the case may be, a proportionate part thereof, is returnable :

Provided that where the subject-matter has been insured "lost or not lost" and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the underwriter knew of the safe arrival.

The exception is explained simply by the fact that when the insurance was effected the underwriter had information which, had it been at the disposal of the assured, would have rendered the insurance unnecessary, and the only equitable course in such a case is to make the underwriter return the premium which he improperly accepted.

- (c) Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering.

In other words, the law will not allow the underwriter to retain premium paid to him to protect some interest which turns out never to have been exposed to perils on the voyage insured, and therefore in such cases the underwriter is compelled to return the premium. But as there are gambling policies pretending to cover interest which in reality does not exist and is never intended to exist, the law declines to recognise them and pays no heed to the fate of the premium paid on them.

- (d) Where the assured has a defeasible interest, which is terminated during the currency of the risk, the premium is not returnable.
- (e) Where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable.

Suppose a shipowner had reason for not desiring to state in his policies a valuation of one of his steamers, but effected insurances amounting in all to Thirty-three Thousand Pounds, and the vessel was lost, it would be necessary for him then to prove the value of the steamer by taking her value at the commencement of the voyage, including outfit, stores, and provisions for the crew, advances made against the crew's wages, and cost of insurance. If the sum of these amounts to Thirty Thousand Pounds he will be entitled to a return of premium of three thirty-thirds, that being the proportion between the difference of the amount insured and the proper valuation of the vessel.

- (f) Subject to the foregoing provisions, where the assured has over-insured by double insurance, a proportionate part of the several premiums is returnable :

Provided that, if the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured thereby, no premium is returnable in respect of that policy : and when the double insurance is effected knowingly by the assured, no premium is returnable.

The reasons for the course prescribed in respect of the two named cases of double insurance are :

- (i) The underwriter is protected in cases where he has

had the burden of the complete risk, or has paid a total loss on his policy in respect of that complete risk, by being entitled by the law to retain the full amount of premium he receives.

(2) In cases where the assured for reasons of his own desires a second insurance, either because he fears the first policy may not be available for him, or because he dislikes the security offered by it, he is by voluntarily rejecting the first policy virtually, throwing the whole burden of the insurance as far as he is concerned on the second policy, and it is not considered equitable that he should at a later period recover from the underwriter any portion of the premium which he had previously paid.

THE PERILS INSURED AGAINST

In the foregoing pages we have discussed at more or less length the various matters connected with the insurance of a marine venture, such as the interests insurable, the value insurable, the voyage, the policy of insurance, its necessary character as an instrument of the fullest good faith, the express and implied warranties or conditions connected with the policy, the method of transferring the policy, the liability for payment of premium, the effect of double insurance, both on the amounts insured and as creating the necessity for return of part of the premium. Now it is necessary to proceed to the consideration of the second great section of knowledge bearing on Marine Insurance, which is the cause, and in a sense the aim, of the whole business of Marine Insurance, namely, the consideration of the different kinds of loss, damage, and liability which attach to the contract of Marine Insurance. But all policies are not of the same scope ; there are varieties not only in the perils covered, but also in the conditions of the contract as regards indemnity. Consequently it appears to be appropriate to consider in detail the perils insured against in a Marine Insurance policy, and thereafter the different kinds of liability for loss and damage and the responsibility for sacrifices and expenses that may fall on the interest insured, also the extent to which the underwriter binds himself by

his policy to take burden of the same. As already remarked above, the Marine Insurance Act does not prescribe any form of policy which must be employed. All it does in Section 30, Part I., is to state that a policy may be in the form given in the first Schedule to that Act. It is noticeable that the underwriters are represented in the second part of the policy as being "content to take and bear upon themselves in the *voyage insured*" certain named "*adventures and perils*." It will be necessary to pay particular attention to both these points. (1) If the ship by a change of voyage or a deviation ceases to pursue the venture which her owner originally contemplated, then nothing that happens can be claimed to have occurred on *the voyage insured*, so that the policy might either never attach or might lose its connection with the interest intended to be insured through deviation, illegality of employment, or undue delay. In other words, the voyage which the vessel actually undertook would be different from the voyage insured in the policy. (2) Next, it is not occurrences common to all navigation of which the underwriters are contented to take and bear burden, but it is *adventures and perils*, things extraordinary and accidental to the exclusion of the ordinary inevitable incidents occurring in all sea transit, casualties which may, and not consequences which must, occur. This consideration will exclude from the scope of the policy everything of the nature of wear and tear, as that kind of damage is inseparable from the existence or use for any considerable period of time of the material object insured; and likewise that kind of impairment which results from the nature of the article insured and is consequently termed inherent character or quality or (more frequently but less happily) inherent vice (*vice propre*). It is often in practice extremely difficult to distinguish between damage arising from an inherent character or quality and damage arising from perils insured against, especially where the interest is merchandise inclined to suffer severely from contact with sea-water or with other cargo damaged by sea-water, or from being stowed next or near to cargo of penetrating odour or strong taste. There is no doubt, for instance, that flour in bags will take up the odour of apples stowed in the same hold, without the inter-

vention of any water or weather whatsoever. Such a loss is a loss not arising from a peril or adventure assumed by the underwriter, but resulting from the stevedore's mistake in placing together in the ship's hold classes of cargo detrimental to one another. Similarly damage to such cargo as grain from the odour of creosote arising from carrying creosoted sleepers on a preceding voyage cannot fairly be regarded as caused by a peril or adventure occurring on the voyage in which the grain was carried. The Schedule policy proceeds to specify with some detail perils and adventures assumed *nominativum* by the underwriters accepting the insurance. First comes "Perils of the Seas," interpreted in No. 7 of the Rules for the Construction of the Policy to "refer only to fortuitous accidents or casualties of the seas and not to include the ordinary action of the winds and waves." But this definition is not entirely without difficulties. There are times, seasons, localities in which the ordinary action of the winds and waves is distinctly perilous, and although it gives rise to accidents and casualties of the seas as distinguished from incidents of the voyage, it is doubtful how far they can be called fortuitous. For instance, the bursting of the monsoon in the Indian Ocean, the opening of the hurricane season in the West Indies, the almost regular storms in the North Atlantic occurring about the time of the change of season from autumn into winter and from spring into summer, generally, but hardly correctly, known as the equinoctial gales. The ordinary action of wind and waves in those instances is distinctly tempestuous and perilous, but can it fairly be called fortuitous? Would the resting of a ship on stones at the bottom of a tidal harbour to which she was ordered with the expectation of her grounding be a fortuitous peril or an incident ordinary to her use of that port? Further, since the introduction of steamships the obstacles to a successful voyage are no longer found in the winds and the waves only; derangements of, or accidents to the propelling machinery inside the ship, the propeller outside it, and the shafting or other connection between the two, are as effective in preventing a voyage as accidents to the hull, masts, or sails, which were, until the introduction

of mechanical propulsion, the only material parts of the ship which had to be taken into consideration. One has nowadays to take into consideration what fortuitous circumstances or extraordinary occurrences have to be regarded in coming into a proper interpretation of the term "Perils of the Seas" when applied to ships which depend for their movement on something different from the winds, masts, and sails. It will be seen later that clauses have been formed suitable for application to steamships, but it is submitted that the purview of the underwriter must not now be limited to steamships. The internal explosion engine has already been adapted to sea-going craft, and engineers do not yet know what may be the ultimate development of that form of motor; but it is quite certain that there is no such thing as finality, and underwriters must be prepared in time to provide for insurance of vessels whose engines are driven by a power obtained from sources yet obscure and in methods not yet conceived.

It has sometimes been stated that in order to constitute a loss from a peril of the seas, the sea or salt water must be the destroying agent. But this appears to leave out of consideration all losses arising from the action of the winds only. For instance, the sudden attack of a hurricane coming on a vessel in full sail might result in all her sails being blown to ribbons, and all the masts going by the board, with the yards and rigging with them. Can it be doubted that this constitutes a peril of the seas just as really as if a strake of plating or planking had been knocked in by the waves or by floating wreckage? The best catalogue of casualties that have been regarded as perils of the seas is given by Phillips (Section 1099): "Perils of the seas comprehend those of the winds, waves, lightning, rocks, shoals, collision, and in general all causes of loss and damage to the property insured arising from the elements and inevitable accidents, though sometimes considered not to include capture and detention." But there are two points in this definition that are open to doubt. First, it omits to state that the loss or damage must be material or physical. Second, the qualification of accidents as "inevitable" is, as has already been shown, not consistent with the ground

idea of Marine Insurance to cover accidents that *may* occur and not incidents that *must* occur. And it is only the latter that can be called inevitable. The mention of collision introduces a new line of thought. A collision is certainly a disaster to one if not both of the vessels involved in it. It is almost always accidental and is certainly a peril of navigation. But it is one in which the fault of the humans in charge of one or both ships plays a great part, and for which in the jurisprudence of almost every maritime country the guilty party has to take the responsibility, quite apart from any question of insurance. At a later stage it will be seen how and to what extent this liability is transferred to marine underwriters. Similarly Capture and Detention will come to be considered later. There is one form of peril not included *nominativum* by Phillips, but no doubt it was in his mind as being practically included in his general words, the case of missing ships, vessels which in the absence of news are presumed to have perished in the course of their voyage from one or several of the perils specially named. In some countries it has been customary to prescribe by law or by a special provision in the policy the period that has to elapse from sailing or from last news, as the case may be, before the loss can be claimed from the underwriter. And one might also add to Phillips's list upheaval of sea bottom or sudden protrusion of reefs caused by earthquake resulting in ships being stranded in mid-ocean or being left high and dry on a hillside, as has happened both on the Chilean and on the New Zealand coast.

Fire.—The only other peril of the elements specified in the ordinary form of policy is fire. The extent to which the protection against fire given in a Marine Insurance policy goes has been the subject of much litigation. But that has arisen mainly out of consideration of the circumstances attending the special fires in question, as being the result of carelessness, negligence, or intentional destruction. But the net result of all the litigation was that if a ship is destroyed by a fire "it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state," and that in case of a fire loss through negligence of the mate there is no authority in

English law for holding underwriters not liable for a loss, the *proximate* cause of which was one of the enumerated risks, though the *remote* cause might be traced to the negligence of the master and mariners. The distinction of classes of causes here mentioned will be found later to be one of immense importance.

It seems never to have been doubted that the loss or damage by lightning is covered by the word "fire" in the policy, although closer examination might lead one to doubt whether the conclusion is entirely just. Undoubtedly lightning sometimes produces fire, but the action of an electric discharge is not the same as that of combustion. Similarly there are explosives that require a spark or a flame to release their latent forces, while other explosives such as nitro-glycerine and dynamite require a blow to set them off. Consequently, while a vessel wrecked by a gunpowder explosion might fairly be considered to be damaged by fire, loss resulting from a dynamite or nitro-glycerine explosion would not be similarly claimable. There is certainly every reason for doubting that an explosion of steam is sufficiently like the effect of fire upon a ship to enable the resultant damage to be successfully claimed from underwriters who cover fire. In all the preceding cases the loss or damage is supposed to have arisen from fire on board the ship. But suppose a case in which a fire on board another vessel or in some shed or quay resulted in explosion of some goods on board the other ship or stowed in the shed or quay which did damage to a vessel or its cargo. Such an accident happened to the *Nordland* at Antwerp in 1889, where a great petroleum explosion occurred ashore and seriously damaged the vessel although she was on the side of the docks furthest from the petroleum tanks. Underwriters paid for the loss "without prejudice," regarding the damage as a result of an explosion caused by fire. On the other hand, an explosion of steam caused by the bursting of a marine boiler has been held not to be a loss by fire whether the boiler was on board the ship or not.

One form of fire arising in the fuel, stores, or cargo of a vessel, but often affecting the hull as well, remains to be

mentioned—that is, what is called spontaneous combustion, generally arising from a damaged state of the cargo or from some inherent quality (*vice propre*). As a matter of fact, combustion is called spontaneous when no other real cause has been proved to exist sufficient to originate the fire. The late M. de Courcy (*Commentaire*, p. 218) most justly remarks: "Spontaneous combustion is a form of words employed to indicate a production of internal facts without known external agents." "It is never certain that the combustion has been spontaneous." Speaking generally, it would appear that underwriters on goods are not responsible for damage done to those goods by a fire arising from the condition in which they were shipped. But the underwriters on other goods in the same hold not contributing to the cause of loss are liable for the damage done by the fire to them, and the opinion has been given that underwriters on the ship would likewise be liable. But the freedom from liability of the underwriters on the harmful cargo must equitably be taken with a certain limitation. If the cargo is such as is notoriously liable to combustion, and the rate of premium demanded for the voyage insured is obviously based on the excessive liability of this class of cargo to fire, then there is no doubt that the underwriter would be held to have had this fact in mind when he accepted the risk. This remark particularly applies to cargoes of coal shipped from England, Australia, and India.

The rest of the perils enumerated in the ordinary form of policy are strung together in a somewhat haphazard way which, however, closely resembles the standard Florentine form of 1523. It almost appears that the perils were added one by one as they were found in the history of insurance to become necessary for the proper protection of the assured. They naturally fall into two classes:

- (a) Perils arising from action of persons on board the insured vessel—jettison, barratry.
- (b) Perils arising from the action of persons not on board the insured vessel—men-of-war, enemies, pirates, rovers, thieves, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints

and detainments of all kings, princes, and peoples of what nation, condition, or quality soever.

Jettison.—"Jettison is the throwing overboard of a part of the cargo or any article on board of a ship, or the cutting and casting away of masts, spars, rigging, sails, or other furniture for the purpose of lightening or relieving the ship in case of necessity or emergency."—Phillips (Section 1278).

If there is a real emergency and a merchant's goods or part of the shipowner's property in the shape of tackle, sails, or other equipment are thrown overboard to prevent threatened loss from becoming actual, the merchant or shipowner is in no worse a position than if the loss had actually occurred, nor is his underwriter. Consequently it is quite likely that the statement made by Ashburner¹ is correct, namely, that all marine losses were originally allowed to lie where they fell. In other words, there was no liability on the part of the co-adventurers, or the shipowner, or any cargo-owner to share in any loss sustained by them or either of them. The mention of jettison in the policy of itself implies that the underwriter assumed responsibility for the loss arising to the assured from his cargo being thrown overboard, quite irrespective of any claim the assured might have on the other parties interested in the ship and cargo to be indemnified for the loss by them. It is assumed, of course, that the jettison has been made in good faith and honesty. It has to be borne in mind that in order to justify a claim for jettison it must be shown that the articles thrown overboard were, previous to the time of their sacrifice, in their proper place in the ship, for unless an express agreement to the contrary is made, or it is the notorious custom of the particular trade to carry cargo on deck, the only goods covered by a marine policy are those carried under deck. Consequently an underwriter would not become liable for a jettison of bales of manufactured goods unless they were taken from the hold to be jettisoned. If the ship carried them on deck and jettisoned them from that position, a merchant would have no claim against his underwriter, but only against the shipowner. Cargo carried in deck houses is, as far as jettison is concerned, equivalent

¹ *Rhodian Sea Law*, p. cxli.

to deck cargo, and the question has been mooted whether cotton in bales carried under a shade or awning deck is stowed in a proper place for carriage or is likewise to be considered as equivalent to deck cargo. On the other hand, certain classes of goods (vitriol, ether, carbolic acid, and similar chemicals of inflammable or corrosive character) are, in all trades, in consequence of their dangerous nature, carried on deck and nowhere else. The underwriter taking a risk on such goods is reasonably held to be cognisant of their peculiar nature and the position in the ship which they occupy. Therefore, when such articles are thrown from deck for the purpose of lightening the ship, the underwriter who insures them is doubtless liable for loss. If, on the other hand, they were jettisoned in order to remove from the ship and the rest of the cargo the danger that would arise from the packages being broken, the loss would seem to be more truly the result of the inherent character (*vice propre*) of the goods, and therefore be not recoverable from the underwriter. It is therefore in consequence of this that the custom has arisen to state specially in the policies covering such goods that they are insured against all risks of jettison and washing overboard.

But this simple and direct method of dealing with jettisons was at a very early period—in fact long before the invention of insurance—abandoned in favour of a much more complex system connected with the contract of affrightment. In Justinian's *Digest*, Book xiv. Tit. 2, Section 1, the following passage occurs: “It is decreed by Rhodian law that if the jettison of goods has occurred in order to lighten a ship, that which has been given for all shall be replaced by the contribution of all.” This principle introduced into the law of carriage by sea has resulted in the development of what has come to be known as General Average. The great discussions that have occurred about jettison in connection with Marine Insurance have really not been concerned with the mere jettison but with the manner in which the loss by jettison has to be made good by the contribution of all. From cases of jettison the application of General Average has passed to every other form of sacrifice made and expense incurred for the common benefit.

Barratry.—Barratry is excessively difficult to define. The Schedule to the Marine Insurance Act gives the authoritative explanation that it includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer. The following are cases which the Courts have declared to be barratrous: scuttling a ship, intentionally running a ship ashore with the object of throwing her away, setting a ship on fire, abandoning the voyage on which the venture started, illegally selling a vessel and cargo and appropriating the proceeds, deviating from a vessel's proper course for the captain's private business or convenience. This last case brings out the distinctive feature of barratry. Mere deviation is not barratrous: deviation with criminal intent is. Similarly, sheer negligence on the captain's part leading to smuggling by the crew in a foreign port, and seizure of his vessel by foreign customs authorities, is not by English law barratry. But an intentional want of care or the perpetration of any intentional act of negligence with the object of getting the ship confiscated would constitute a case of barratry. Connivance of the owner in a barratrous act will of course deprive him of the protection of his policy against barratry.

It is to be noticed that in French law the word "baraterie" includes all varieties of fraud, as well as of simple imprudence, want of care, and want of skill, both of master and of crew. Lord Mansfield suggested that it is strange that barratry should have ever crept into insurance. He was probably thinking of policies on ships; in case of these it does seem curious that the common form of policy should contain provision by which guarantee is given for the commercial honour and the honesty of a master and crew who must be better known to the shipowner than to the underwriter. No doubt things in this respect have changed since his day, but even then it was not unreasonable that cargo-owners should ask to be protected against barratry of the master or crew over whom they had no means of control.

Turning now to the perils arising from the actions of persons not on board the insured vessel, it has been elsewhere suggested by the present writer that the sense of the

paragraph in the common form of policy beginning “men-of-war” and ending “nation, condition, or quality soever” would be made much clearer if the wording were slightly rearranged as follows :

Surprisals and takings at sea by all men-of-war, enemies, letters of mart and counter-mart, pirates, rovers and thieves, arrests and detainments of all kings, princes, and people, of what nation, condition, or quality soever.

This rearrangement distinguishes the hostile acts of all classes of adversaries at sea from the less stringent measures which may result in the mere stoppage of property by the administrative act of some foreign power.

To take the words in the order in which they occur in the policy—

Men-of-War.—About these there can be no mistake. They are the authorised and recognised armed military sea force of a nation prepared for maritime warfare. In all probability opinions would differ on the question whether armoured merchant cruisers would rank as men-of-war. But if they are not included under this heading they will come under the next.

Enemies.—As the only risk from men-of-war would be from those of an enemy flag, it is obvious that the word enemies must be used in some special sense. In all probability they were originally intended to designate privateers, and other openly declared foes under a hostile flag, authorised to carry on warfare, but not belonging to the government of the country whose flag they fly. Privateering was formally abolished by the treaty of Paris, 1856, at least as regards the signatories of that treaty, and the question might arise whether armoured merchant cruisers are not after all in law merely a special class of privateers. There is one class of such vessels specially designated in the policy, viz. :

Letters of Mart.—Letters of mart and counter-mart (or marque and counter-marque). In the wars of the eighteenth century, kings and governments were accustomed to grant to their subjects who had suffered seriously from attacks of the enemy, a limited form of commission to privateer,

called a “ Letter of Marque,” entitling them to make war upon or capture the property of the nation or district from which they had suffered. The commission was really one authorising the holder to make reprisals against those who had inflicted damage to or taken property from him. The distinctive of letters of marque was that they were private ships specially authorised not to carry on war in all its senses like privateers, but to inflict reprisals upon the enemy, or certain portions of the enemy who had inflicted suffering on the other belligerent. The three classes of vessels described agree in these points : they all own a national flag, they all hold commissions from the government of their flag, they carry on hostilities only with the declared enemies of their own nation.

On the other hand, *Pirates and Rovers* own no nationality. To every organised state they are enemies, being in fact outlaws of all. It is difficult to understand why the words pirates and rovers should both be used ; a pirate is one who makes attempts or attacks on ships and property at sea ; a rover is one who prowls about looking for plunder. There is just the possibility that the word “rovers” was added to include specially the Mohammedan sea robbers of North Africa, as they were often designated by that name and formed a large proportion of the pirates of the Mediterranean and the West Coast of Africa and the Peninsula.

In the Rules for the Construction of Policy in the Schedule it is declared that the term pirates includes passengers who mutiny and rioters who attack the ship from the shore. The effect of this is to give the assured as complete protection from the acts of all private persons, not connected with the ship, as he has already under the head of barratry received from all persons of the ship’s company.

Thieves.—It is difficult to differentiate between robbers and thieves, but the Rules for the Construction of the Policy provide that the term “thieves” does not cover clandestine theft, or a theft committed by any one of the ship’s company, whether crew or passengers. The theory of text-book writers has been that the class of depredators called thieves in the policy are not regardless of human life, like pirates and rovers, although they would not hesitate to use violence

in order to get possession of property. The policy in use in America qualifies them as "assailing thieves." The conclusion drawn by Phillips (Section 1106) that "in a policy against robbers and thieves without the qualification assailing, underwriters are liable for theft committed on the voyage in spite of due vigilance and precautions against it," does not hold good in England. Here it has always been held that pilferage or petty theft is not covered by a marine policy unless it is definitely specified.

Surprisals.—All the hostile persons named above have for their object surprisals or takings at sea. Surprisal is a word never now heard in commerce, its place being taken by the word capture. Under this heading underwriters are liable to pay the insured value of ships or goods captured by the enemy or by pirates, the necessary expenses of recovering captured ships and goods, and any sum paid to stop condemnation in the prize court. As insurance against capture is not limited to British ships only, occasions have arisen when a foreign ship insured with a British underwriter has been captured by a British man-of-war or privateer. In several such cases occurring early in the nineteenth century the British courts decided that the policy was void. This has not prevented the issue since then of policies against the same risks of British capture. But it should be understood that these are honour policies only and cannot be sued upon in any British court, although it is neither a crime nor a misdemeanour to issue them.

Takings at Sea.—In takings at sea we appear to have another duplication. But on the whole it appears that the term is milder than surprisals and indicates the stoppage and forcible taking into port of neutral vessels, probably stopped on account of their cargo being suspected of belonging to the enemy. The intention of a taking at sea is to keep the property taken from being used to the disadvantage of the taker, but it does not imply any desire to entirely dispossess its rightful owner of his property. If we can identify surprisals with capture, then the modern word for takings at sea will be seizure.

Next follow the words *Arrests, restraints, and detainments of all kings, princes, and peoples, etc., etc.* The

acts indicated in these words are acts of interference by recognised authorities. The Rules for Construction of Policy state that the term quoted refers to political or executive acts, and does not include a loss caused by a riot or ordinary judicial process. For instance, without declaration of war or any other hostile intention, a government may declare what is called an embargo, a prohibition to remove certain vessels or certain classes of goods. There is probably no intention to deprive the owner of them in the end, but for the time being he is left without his goods and without the means of removing them. If the assured is not a subject or citizen of the country imposing the embargo he is entitled to the protection given by this clause, and if the delay caused by this arrest, restraint, or detainment exceeds a reasonable time, he is entitled to recover from the underwriter. But it is to be remarked that the question of the nationality of the person or corporation insured is in these cases examined with great strictness.

As the inclusion of the risks of warfare in the policy involves a great addition to the rate of premium paid, it has been found by merchants convenient to exempt the underwriter by special stipulation from the risks of war, leaving at his charge merely the perils of piracy. The underwriter finding it convenient to have his liability respecting captures, seizures, etc., limited, has been willing to concur in this arrangement, and a new contract between the parties has been formed. This is expressed in the following clause :

Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

This clause has come to be regarded as part of the ordinary policy. In this clause "capture and seizure" are used for the words "surprisal" and "taking at sea" in the words of the policy, and by a great misfortune the word "detention" has been used to represent the "arrests, restraints, and detainments of all kings, etc." The full seriousness of this misfortune is not visible until one comes to consider the effect of the word "detention" in the clause which is employed by

underwriters when they subscribe amounts on policies against war risk only. The special clause used in these policies runs as follows :

WAR RISK ONLY

This Insurance is to cover such war risks as are insured by Marine Policy or Policies of the usual form when the following clause is struck out or omitted.

Warranted free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after Declaration of War.

The effect of this clause is to restore to the policy all the protection granted by the words commencing "men-of-war" and running down to "kings, princes, and peoples of what nations, condition, or quality soever." Now the perils arising from those persons and enumerated in the policy are perils of physical loss, deterioration, and dis- possession. There is no suggestion that loss of interest by lapse of time or of market is included, and in English practice they are in fact excluded. But the unfortunate use of the word "detention" in the F.C. and S. clause as the equivalent of "detainment" has led the assured in some cases to consider that he is covered for mere loss of time or market irrespective of the physical condition in which the goods arrived.

To provide protection against loss and damage suffered by insured objects from the violence of such as are not constituted authorities and cannot be regarded as pirates, it has lately been found necessary to devise a form of words by which the underwriter assumes liability for the loss and damage immediately resulting from strikes or labour disturbances, riots, and civil commotions. This has been done in the following form :

In consideration of an additional premium of . . . per cent which is included in the above rate . . . it is agreed to include loss or damage caused by strikers, locked-out workmen, or persons taking part in labour disturbances, or riots, or civil commotions, but in no case is policy to be extended to cover loss of market, delay or deterioration.

The difference between the form in which this clause has been conceived and that adopted for the "War risks only" clause arises solely from the fact that in the former case the hazards accepted were not within the contemplation of the original formers of the policy, while in the latter case they were actually covered by the policy, although generally eliminated by a special clause of exemption.

All other Perils, Losses, and Misfortunes.—The catalogue of adventures and perils covered by a policy closes with the comprehensive clause "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises and ship, etc., or any part thereof." The apparent universality of the cover granted by these words is considerably limited in the Rules for Construction of Policy, where we find:

Rule 12. The term "All other perils" includes only perils similar in kind to the perils specifically mentioned in the policy.

The principle embodied in the words of this rule is known as the principle "*ejusdem generis*" (of the same kind). Probably the best exposition of that principle was one given in 1816 by Lord Ellenborough: "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."¹ But it must be remarked that this principle will not be applied in cases where such a wording is employed in the policy as indicates an intention to include losses of any other specified kind, still less if such an indefinite wording is employed as to suggest that every kind of risk is included. This has

¹ *Cullen v. Butler* (1815).

been decided in the case of a policy containing the definite clause "against all risks by land and by water."¹

The Act having thus imposed the principle "*eiusdem generis*" on all policies which do not bear on them marks of an intention to avoid that limitation, it becomes in every case a question of fact whether the peril causing the loss or damage claimed is in fact "*eiusdem generis*" with those named in the policies. It may be instructive to name the following cases in which the loss has been held to be covered by these general words:

One British ship mistaken by another British ship for an enemy, fired upon by her and sunk (*Cullen v. Butler*, 1815).

Coined money (dollars) thrown overboard by the captain of a ship to prevent their falling into the hands of an enemy by whom he was being pursued (*Butler v. Wildman*, 1820).

A ship insured for time "at sea and in port" blown over on her side by violent winds while in graving dock and bilged (*Phillip v. Barker*, 1821).

A ship being hauled up on slip still partly water-borne, blown over on her side and damaged (*De Vaux v. Janson*, 1839).

LOSS AND ABANDONMENT

§§ 55-63

After the discussion of the losses and adventures insured against, as stated in the ordinary form of policy, it is necessary to return to the Act and examine its sections regarding loss and abandonment. It is enacted that—

§ 55. Subject to the provisions of the Act, and unless the policy otherwise provides, the underwriter is liable for any loss proximately caused through a peril insured against, but, subject as aforesaid, he is not liable for any loss not proximately caused by a peril insured against.

¹ In the same case Mr. Justice Walton said, "Of course where parties desire to cover all risk of every kind, that could be done by simply saying 'all risks whatsoever'" (*Schloss v. Stevens*, 1906, 21 Times L.R. 776).

The doctrine of proximate cause is expressed in the legal maxim *Causa proxima non remota spectetur*. Its practical effect is to bring within reasonable limits the scope within which liability may be attributed to the underwriter, for although it is not merely a maxim of Marine Insurance law, it is probably more heard of in this connection than in any other. It excludes what may be termed all secondary or consequential losses arising in connection with maritime loss or damage, such as loss of market, loss through delay in replacing, loss arising from inability to complete a venture resulting from physical loss or damage to some part of the necessary machinery, etc., etc. It is in every case a question of fact whether a loss claimed is proximately caused by a peril insured against. Where several sets of underwriters are interested in the insurance of one subject-matter, but against different perils, or on different conditions, it becomes very important in case of a loss or damage to determine the true proximate cause of the same. Some difficulty arises from the fact that it has been customary to use the words "proximate cause," while to most people the use of the words "immediate cause" would be much clearer and certainly less artificial. For instance, if a ship is damaged by perils of the seas so that the underwriter becomes liable for the cost of repairs, his liability is fully met by a payment of his proper share of the costs. But the shipowner is not by this payment indemnified against all the loss he has sustained, for he has a second loss arising from the fact that the ship during the period of repairs is unable to earn freight. This secondary loss, not being the *immediate* result of the accident that produced the damage, is not recoverable from the underwriter on the ship. This should be compared and contrasted with the position taken up when one ship-owner claims from another payment of the damages, etc., caused by collision resulting from the fault of the other ship. In that case the law grants to the injured party not only the cost of repair of the material damage of the vessel, but also a charge for the loss of employment during the time occupied in doing the repairs.

The distinction between proximate and remote cause of loss is made clearer by example than it can be made by

definition. The master of a ship disabled by perils of the sea and repaired at a port of refuge had no funds to meet the bills and was compelled to sell some of his cargo to pay them. It was held that this loss of cargo was not a loss by perils of the sea, though they were the remote cause of it, the proximate cause being the want of funds to pay for the repairs. A vessel bought after being out of work for a while was fitted up by the new owner for his special trade without sparing expense or trouble. She made a voyage from London to Gothenburg, arriving there with a little more water in her than was expected. On the return voyage, meeting a gale, she began to leak, and becoming full of water did not answer her helm. In consequence of this, and of fog, and of the gale, she got ashore on the Yorkshire coast and went to pieces. The jury found that she was unseaworthy, but would not have been lost had it not been for the gale, also that the unseaworthiness arose through no fault of the owner and was a latent defect. In the Appeal Court, Lord (then Mr. Justice) Blackburn dissected the causes of loss as follows :

“ The ship perished because she went ashore on the coast of Yorkshire. The cause of her going ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, namely, her being in distress and full of water, was that when she laboured in the rolling sea she made water ; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been ; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss ” (*Dudgeon v. Pembroke*, 1871).

The following instance illustrates the incidence of liability in cases in which there are two mutually exclusive sets of policies (e.g. one set excluding war risk and one set

covering war risk only). It is an imaginary case stated in 1863 by Chief Justice Erle (in *Ionides v. Universal M.I. Co.*).

"Suppose the ship insured free from all consequences of hostilities is going to a port where there are two channels, in one of which a torpedo has been laid by the enemy. If the master not knowing this goes into the channel where the torpedo is and is blown up, this is within the exception; not so if, knowing of the torpedo, he takes the other channel to avoid it, and by unskilful navigation runs aground there."

The case in connection with which Mr. Justice Erle invented the preceding instance was one in which a coffee-laden ship struck a reef of rocks and became a wreck, the captain having lost his reckoning owing to Cape Hatteras light being extinguished for strategic reasons by the Confederates in the American Civil War. The cargo consisted of 6050 bags of coffee, of which 1020 would have been saved but for the intervention of the Confederate troops, who, however, salved 170 for their own use. It was decided that the underwriters who insured the coffee free from all consequences of hostilities were not liable for the loss of the 1020, but were liable for the loss of the remaining 5030. The 1020 were lost in consequence of hostilities, but the 5030 from perils of the seas, namely, from striking the reef, which was not by any means an inevitable or even a usual consequence of the extinction of the light.

Since the passing of the Marine Insurance Act the House of Lords has given a decision which bears on the same matter. A steamer was captured by one of the belligerent's men-of-war but was lost by perils of the seas during a voyage which it took in company with the men-of-war to one of the latter's national ports. It was held that as far as the owner of the vessel was concerned she was totally lost by capture, and the later total loss by perils of the seas never became for him effective (The *Romulus*, H.L. 1908).

The Statute goes on to define and describe certain cases of non-liability of the underwriter:

§ 55. (a) [He] is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise

provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

It is obvious from the preceding that the law draws a sharp distinction between losses attributable to the wilful misconduct of the assured and those arising out of the misconduct or negligence of the master or crew. The losses due to the wilful misconduct of the two latter are already covered by the word "Barratry." The class of losses contemplated in the latter portion of this clause may be illustrated by the following instances :

A ship wintering in a port in the Gulf of Finland under charge of the mate was burnt owing to his negligence in not extinguishing a fire, which he had lighted in the cabin before leaving the ship to board another vessel (*Busk v. Royal Exchange*, 1818).

A ship of very sharp bilge lashed to a harbour pier fell over as the tide ebbed and was stove in and stranded, the mate having negligently not supplied hawsers of sufficient strength to hold her up (*Bishop v. Pentland*, 1827).

Cargo damaged by sea water let into the ship while the vessel was loading in port through the crew negligently leaving open some cocks or valves in the machinery (*Davidson v. Burnand*, 1868).

A vessel stranded through the negligence of the master, who was also part owner (*Trinder v. Thames and Mersey Co.*, 1898).

In all these instances the underwriter against perils of the seas was held to be responsible for the loss.

On the other hand, where a vessel was with the deliberate knowledge, one might say by the wilful act, of her owner, sent out of a port without proper preparation for sea, was anchored in an exposed position, driven ashore by a gale, and totally wrecked, it was decided that the assured could not recover from the underwriter, although it was acknowledged that the gale, a sea peril, was the immediate cause of the loss.

§ 55. (b) Unless the policy otherwise provides, the underwriter on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against.

The applicability of this clause to goods, especially to fruits and other perishables, is obvious. For to insist on making the underwriter on such merchandise responsible for deterioration or loss of condition arising from delay, however caused, is in effect equivalent to converting his policy into a guarantee of delivery at destination within a certain period of time. Such a guarantee was never in the contemplation of a marine underwriter insuring such produce against the perils of transit, so that to impose on him a liability for damage from delay means compulsorily extending the protection given by his policy. Sea peril or no sea peril intervening, the mere lapse of time is necessarily accompanied by deterioration or loss of condition. If this happens when there is no peril, it is obviously not a condition immediately brought about by a peril when one occurs. But as regards a ship it is more difficult to see how the clause takes effect. It does not hold in the case of missing ships where protracted or unlimited delay in arriving at destination is the ground on which claim is made for a loss. The only other way in which a ship is in any of its insurance aspects affected by delay is in connection with time lost in consequence of a collision, which, as we have stated above, does not form a liability on the part of the ship underwriter, although it does fall to the charge of the vessel to blame for the collision in question.

But it is noticeable that the third great maritime interest, freight, is not mentioned in this clause, and with respect to freight a totally different set of considerations comes into play. This arises partly from the fact that freight is not, like ship or goods, a tangible material interest exposed to the perils insured against, unless it happens to be freight advanced, which is practically an addition to the cost price of the cargo. But freight at risk is an expectation of revenue or gain which can be lost through perils of the seas interfering with the intended completion of the ship's engagement. For instance, a vessel sails on an outward voyage with a

cargo to deliver at a foreign port, and the owner naturally seeks further employment for her from that port or from some neighbouring port. He consequently negotiates a charter binding on both parties if the vessel arrives at the port of loading before a fixed date. In his own interest the shipowner fixes that date (called the cancelling date, for failure to arrive then or earlier entitles the charterer to cancel the engagement), giving himself reasonable chance of being in time. But should the vessel strand on the outward voyage and lose a month in being floated and another month in repairs, the probability is that the cancelling date has been passed and the employment lost. In such a case there is fair reason for considering that the loss of freight is a casualty caused by peril of the sea, and not solely by the exercise of the charterer's option to cancel in case of the vessel's arrival after the stipulated date.

The net result of all the cases that have been tried on this point is that the true view to take is to cast upon underwriters the liability for loss of freight when the clause providing cancellation or suspension of payment of hire is put into operation through the immediate action of the perils insured against (Mr. Justice Barnes in the *Alps*, 1893). In this case the loss arose not through the operation of a cancelling clause, but through that of a clause in a charter-party for time, providing that "in event of loss of time from collision, stranding, want of repairs, breakdown in machinery, or any cause appertaining to the duties of the owner, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour of the beginning of the detention until the ship be in an efficient state to resume her service." The ship took fire and was so damaged that repairs became necessary, which occupied thirteen days. The thirteen days' hire was deducted by the charterers, and the question that came before the Court was whether the shipowner was entitled under an ordinary policy on chartered freight to recover these thirteen days' hire. The same result was arrived at in the case of the *Bedouin*, 1893, in which a steamer's thrust shaft parted and she had to be towed into St. Vincent for the fitting of a new shaft, which entailed the stoppage of payment for hire.

§ 55. (c) Unless the policy otherwise provides, the underwriter is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

It has already been mentioned in passing that an underwriter against perils of the seas is free from all liability for such damage as arises from the inherent quality or character of the goods themselves, which is usually technically described as *vice propre*. Now wear and tear are simply one form of *vice propre*. The phrase represents the waste, deterioration, and damage inseparably connected with the mere lapse of time, affecting with equal impartiality, though in unequal measure, every part of the handicraft of man, and probably every arrangement in Nature of her ultimately indestructible atoms. But this wear and tear is probably more observable in connection with ships than anywhere else, and it is consequently reasonable that the exemption of the underwriter from liability for it is specially mentioned. It has, however, to be noticed that it is impossible to determine strictly where wear and tear ends and the effect of a definite casualty begins. Take a ship's rigging, properly looked after, renewed where necessary at the commencement of a voyage, but still containing ropes and wires no longer in their first youth. When the ship gets into rather heavier weather than usual some ropes get smashed, among them some of the older ropes. Can any one be perfectly certain that these breaks were not at least in part due to wear and tear? The reasonableness of this question has been recognised in the days of wooden sailing-ships by the institution of a deduction called "thirds new for old," the theory being that unless when the ship is quite new the replacing of old material by new is of itself a benefit to the shipowner. The arrangement has undergone some modification to make it suitable for iron and steel ships, but the principle of it is recognised in almost every English hull policy, for the form which has now become the standard form contains a clause providing that no thirds shall be deducted from the cost of repairs.

As to leakage and breakage: the least chequered voyage will always produce a certain amount of leakage of fluids and breakage of the vessels containing them, so that it is obviously unfair to treat all such loss on a tempestuous voyage as arising from the extraordinary perils and losses against which the underwriter insures. In practice a deduction is made of what is called ordinary leakage and breakage, the amount of the same being fixed in agreement with the results of the experience of a certain number of voyages or years. In some cases the definite percentage of this ordinary leakage to be deducted is prescribed in the policy, in which case care ought to be taken to word the clause so that the underwriter shall be called upon to pay not merely when the prescribed percentage is attained, but only the amount by which it is exceeded.

The reference to rats and vermin in this clause does not seem to have much scope in these days of metal hulls and spars. It may possibly have been introduced with reference to a case in which rats destroyed a bathroom pipe and gave an inlet of water on to the cargo. This was a case on a bill of lading, but as it was held that the damage to the cargo was damage by a peril of the seas, it is of some importance for Marine Insurance (*Hamilton v. Pandorf*, 1887).

The final exemption, that from any injury to machinery not proximately caused by maritime perils, refers to a case which had to go to the House of Lords for settlement. The facts were as follows:

“The *Inchmaree* was in March 1884 off Diamond Island, lying at anchor and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine and donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water being unable to make its way into the boiler was forced back and split the air-chamber, and so disabled the pump. This was the beginning and end of the misfortune.”

The judgment in the House of Lords was to the effect that the damage in question was not caused by sea perils or by causes similar to them. But the recovery of machinery damage by steamship owners was of such importance that the immediate practical result of this judgment was the drafting of a special clause so worded as to avoid completely the said judgment, which was given on a policy of the ordinary form. The use of that clause has become almost universal in policies on steamers, particularly in time policies. It reads as follows, and is known as the Machinery Negligence Clause :

This insurance also specially to cover (subject to the free-of-average warranty) loss of or damage to hull and machinery through the negligence of master mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided that such loss or damage has not resulted from want of due diligence by the owners of the ship or any of them or by the manager.

PARTIAL AND TOTAL LOSS

§ 56. (1) A loss may be either total or partial. Any loss other than a total loss, as later defined, is a partial loss.

(2) A total loss may be either an actual total loss or a constructive total loss.

(3) Unless a different intention appears from the terms of the policy, an insurance against total loss includes a constructive as well as an actual total loss.

(4) When the assured brings an action for total loss and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

(5) Where goods reach their destination in specie, but by reason of obliteration of marks or otherwise they are incapable of identification, the loss, if any, is partial and not total.

The first three paragraphs of the preceding Section 56 of the Marine Insurance Act are so simple, and appear so extremely reasonable, that they hardly require expansion or illustration. It is almost a matter of regret that the definition of the words "total loss" is postponed to a later section. But after all this postponement does not seriously

interfere with the meaning of the paragraphs, as it is prescribed that whatever loss is not total is of necessity and by definition partial. The fourth paragraph seems to be merely a statement in legal form of the equitable provision that the assured shall not by the fact of his having claimed a total loss, and having failed to establish it, be prevented from recovering a partial loss whose existence he can prove, provided always that his policy binds the underwriter to pay partial losses; in other words, losses other than total. The fifth paragraph is not so simple in its nature. It prescribes the proper mode of dealing with the claim which would arise in case several packages of the same kind of cargo were to arrive at their destination incapable of identification but without having suffered any change of species. In such a case the assured is not entitled to claim a total loss but only a partial loss. For example, where cotton belonging to different owners was shipped in bales and such weather was met on the voyage that many of the bales were burst and their contents mixed up, and the marks on other of the bales were obliterated, it was held that the several owners became tenants in common of the mass and were not entitled to claim against the underwriters for a total loss of the bales not delivered, but only for a partial loss (*Spence v. Union Marine*, 1868). Similarly, if a bulkhead separating two parcels of grain consigned to different owners was by bad weather so damaged as to permit the two shipments to run into one another, so that the actual property of each consignee could no longer be distinguished, there would be no claim for total loss, but only for partial loss. To use legal words, commixture of similar interests arrived at destination *in specie* constitutes only a partial loss. The practical difficulty in cases of this kind would lie in satisfying each consignee that the portion of unidentifiable cargo tendered to him is of as good quality as his identifiable. What would happen in case of a cotton shipment mixed up in the way described if one consignee's parcel was a grade above Good Middling and the rest of the shipment a grade below the same quality? Or in the case of grain, what would happen if the one parcel was Californian wheat and the other Chilian, Australian, or Indian? Would the

ACTUAL TOTAL LOSS

difference of quality prevent the separate interests from being incapable of identification?

The Act proceeds to give the following definition:

§ 57. (1) Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.

(2) In the case of an actual total loss no notice of abandonment need be given.

It is to be presumed, of course, that the destruction, damage to the extent of changing species, or irretrievable removal from the assured, is proximately caused by a peril insured against. Otherwise the underwriter might become liable under this section for total loss arising from the inherent nature of the goods insured, or for one arising from perils for which he is not responsible. Take, for instance, a shipment of cement, which becomes saturated with water from the overflow pipe of a bath, or condensed from steam escaping through a hole in a steam pipe leading to a donkey engine or a winch. In the terms of the clause as it stands, if the whole shipment became so saturated as to change its nature from cement in powder to solidified cement, the underwriter might be in some danger of being asked to pay a total loss, although no sea peril intervened.

The second paragraph of the section introduces two new ideas, (a) Abandonment, (b) Notice of Abandonment, which are often confused in English. They are two wholly distinct things, abandonment being a positive transfer of property, notice of abandonment being a declaration of intention to make such a transfer. It may be said that one of the leading features of the English insurance when contrasted with the insurance of France and other Romance countries is the small part played in the former by the notion of abandonment. English law in practice will be found to give only very rarely to the assured the power of tendering his insured property to the underwriter and demanding him to return the insured value; while in Continental policies it is quite ordinary to find stipulations providing for the right of abandonment when a certain percentage of damage is found in the goods insured. Consequently, in

many cases the Continental underwriter has to pay the total insured value of the goods and take over the goods for his own account, where an English underwriter's bargain would compel him merely to pay his insured amount's proportion of the sum found due from the underwriters for the damage.

In dealing with Section 55, referring to delay, mention was made of missing ships. These are now dealt with definitely in the following words :

§ 58. Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.

This is perfectly simple in all cases where the insurance is on a voyage policy. But the question is more complicated when the insurance is on time, and that time expires before the vessel could be expected to arrive at destination, so that the new policy would attach when the vessel was at sea. In one case of this kind a time policy lapsed eighteen days after the vessel started on a twenty-five days' voyage. The vessel was never heard of after sailing, and no attempt was made to renew the policy. No direct evidence of the date of the loss was obtainable. It was held that the assured is not bound to prove that the loss occurred during the currency of the policy and that when the evidence indicates the probability that the ship was lost before the policy lapsed, the underwriters are liable to pay the amounts which they have insured (*Reid v. The Standard Marine*, 1886). Since the date of this case it has become common to attach to all time policies a clause, known as the continuation clause, of the following tenor :

Should the vessel at the expiry of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the underwriters, be held covered at a *pro rata* monthly premium to her port of destination.

The use of such clause would avoid any difficulty of the kind just mentioned. If a ship paid for as a missing ship afterwards turns up in safety, she belongs to the underwriter in virtue of his having paid her insured value to the owner.

In the matter of missing ships there is a wide divergence between English and Continental practice. The English policy does not mention missing ships, whereas the Continental usually prescribes the period after which absence of news from a vessel shall entitle the ship or cargo-owner to be paid a total loss. The period depends on the voyage intended, a voyage in European waters naturally involving an earlier arrival at port of destination than one to the other side of Cape Horn or the Cape of Good Hope. The practice in England is really regulated by the custom of Lloyd's. When enquiries begin to be made for last news of a vessel, and it is observed that she is what is called "out of time," the Committee of Lloyd's issue notices asking from all persons interested information respecting the movements of the vessel since starting on her last voyage. A certain time is allowed to lapse before any steps are taken, but eventually, in case no news is received, the vessel is "posted" as a "missing" vessel. This posting only takes place on the request of some one interested in the venture, so that there may be missing vessels which are not posted at Lloyd's. The fact of posting is accepted by underwriters at Lloyd's and in England generally as indicating that the time has come to abandon hope of the vessel's arrival at destination and to pay total losses on the policies covering her hull, cargo and freight, and any other interests connected therewith.

The section following the "missing ship" clause is as follows :

§ 59. Where, by a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as, apart from any stipulation in the contract of affreightment, to justify the master in landing and re-shipping the goods or other moveables, or in transhipping them, and sending them on to their destination, the liability of the underwriter continues, notwithstanding the landing or transhipment.

Transhipment.—It seems that there is something wanting from this clause which would account for its position in a portion of the Act dealing with total loss. And it is submitted that what is wanting is a clause indicating that the

mere act of interrupting the voyage, landing and reshipping, or transhipping the goods, etc., and sending them on to destination, does not constitute a claim for total loss, although the liability of the underwriter continues notwithstanding the landing or transhipment. With this addition the clause would be regarded as one limiting the underwriter's liability for total loss in consequence of the acts done at the port of refuge, but on the other hand extending his liability by adding to it the land risk, the risk of reshipment or transhipment, and, in case transhipment is adopted, the risk on to destination in a ship other than the one originally insured.

Constructive Total Loss.—Total loss of a ship or her cargo may occur through any of the major casualties attending navigation, such as sinking, burning, or even stranding. But there are in experience many cases in which a vessel is not actually and absolutely consumed by fire, sunk in deep water, or smashed to pieces against rocks, but is "as good as lost" through the expense of saving and repairing her eating up the whole of her value after she is repaired. It is obvious that any contract purporting to give indemnity for loss would be, to say the least of it, most imperfect if it did not provide for such cases and do so without compelling the assured and the underwriter to go through the whole performance and pay all the expense of salvage and repair, only to find in the end that the labour and cost were in vain. There has therefore been added to the idea of total loss a special sub-division called *Constructive Total Loss* (C.T.L.). This is a loss not material and actual, but only so technically and by construction of law. It has repeatedly occurred that a ship has run on rocks and has damaged herself seriously below the water-line, although she sits upright and to the landsman's eye looks quite sound or only slightly damaged. But any one experienced in the building, repairing, or owning of ships knows that if she were removed from that position she would either sink in deep water, or cost so much to bring to a place of safety and repair, that to incur removal and repair would simply mean throwing good money after bad. The natural course for the owner in these circumstances to adopt is to turn to his underwriters

and say, "I believe this ship is as good as lost. I tender her to you and ask you to pay me the sum insured on your policies, as I am not willing to take the risk of her being salved and repaired at a cost greater than her value when she is salved." Technically described the assured is in these circumstances tendering abandonment and claiming a constructive total loss. This instance will serve as an explanatory introduction to Section 60 of the Act, which runs as follows :

§ 60. (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

The clause contemplates the two possibilities of loss suggested in the instance given above, either that of an eventual actual total loss (*e.g.* the ship sinking in deep water after being hauled off rocks) or what may be called a commercial total loss (*i.e.* the ship salved and repaired at more cost than she is eventually worth). But it also makes it clear that no constructive total loss can occur without abandonment, which must be reasonable. Abandonment is dealt with in Section 62 of the Act. The present section deals with all insurable interests, as no exception is made of any. In the case of goods it is not easy to conceive of an instance in which there would be a constructive total loss on account of an actual total loss appearing to be unavoidable, except where the goods and the ship are in such a position that the former cannot be saved without the latter, and the salvage of the latter is hopeless. On the other hand, constructive total loss of goods which can be both salved and reconditioned is by no means difficult to imagine, as the salvage may run away with a large proportion of the value and reconditioning charges grow in amount with the distance from a manufacturing centre, and are sometimes so swollen up by the customs duties incurred that the cost of the operation of reconditioning becomes commercially prohibitive. In the case of the third great maritime interest

freight (which is not explicitly mentioned in this section of the Act) constructive total loss is less obvious than in ship and goods. For a constructive total loss in the last two interests will always produce an actual total loss of freight at risk, as that will be the result of the abandonment of the voyage. The constructive total loss of freight cannot, in terms of the definition, occur unless the freight is abandoned reasonably on account of its actual total loss appearing to be unavoidable (which appears to be in fact equivalent to the actual total loss of the goods appearing to be unavoidable), or because the freight could only be earned at an expenditure which would exceed the value of the freight after the expenditure had been incurred (which recalls the procedure in establishing a C.T.L. of ship). The test of a constructive total loss of freight appears to be whether that freight can be earned by the shipowner delivering the cargo at destination at an expense less than the amount of freight which is due to him on delivery there. In case the freight is all prepaid there is obviously no pecuniary inducement for him to take on the cargo. If all payable at destination there will be no constructive total loss until the forwarding expense exceeds the full freight less the costs incurred in earning it up to the point of disaster. If the freight is partly prepaid and partly due at destination, the latter part will be the freight at risk for insurance, and if the forwarding cannot be done at a smaller cost than this there will be a constructive total loss of freight. (Query, should the whole cost of earning the total freight be deducted from the freight at risk for comparison with forwarding expenses in determining whether constructive total loss exists or not? Or should the whole cost of earning down to the point of disaster be borne by the freight advanced, or should it be divided between the freight advanced and the freight at risk in proportion to their amounts?)

There is one instance of a total loss of freight in which it is difficult to tell whether the loss should be called actual or constructive, namely, where by sea perils the ship is prevented from loading the cargo which she had contracted to load, except after such a delay as frustrates in a commercial sense the venture entered into by the shipowner

and the charterer. The ship *Spirit of the Dawn* went ashore in Carnarvon Bay in January 1872, on a ballast voyage from Liverpool to Newport, having been chartered to load a cargo of rails for San Francisco to be used in the construction of a railway there. So much time was consumed in efforts to pluck the vessel off the rocks (which in the end succeeded) and in repairs that the charterers, appreciating the seriousness of the delay in the delivery of the cargo at destination, threw up the charter and engaged another vessel to take out the cargo. A claim was made for total loss of freight, and the jury found that the delay was actually such as to put an end, in a commercial sense, to the intended venture. The venture having thus been made of no effect by perils insured against, there was a total loss of freight, and the sum insured on the freight was held to be properly due from the underwriter. It is to be noticed that the charter of the *Spirit of the Dawn* did not contain any cancelling loading date, so that the cancellation did not result from the ship having failed to keep the date provided in the charter party. It could therefore be alleged by the shipowner that cancellation was a matter merely dependent on the cargo-owner's option. And had it not been for the intervention of perils of the seas it is difficult to see how any claim could have successfully been made by the shipowner against the underwriter for the loss of freight which occurred. Since that date it has become customary to insert a detention clause in all freight policies to the following effect :

Warranted free from any claims consequent upon loss of time, whether arising from perils of the sea or otherwise.

§ 60. (2) In particular, there is a constructive total loss—

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered.

The best sea instance that can be given of (a) is that of a vessel lifted by a hurricane over a coral reef and left inside a barrier through which it cannot pass. In the case

of goods, that can be best paralleled by the instance of goods safely stored on a desert island on which the ship carrying them had been wrecked, or of goods shut up in time of war in a town invested by the enemy. Instances of (b) have been given above in connection with the preceding section of the Act.

§ 60. (2) (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of General Average contributions to those repairs, but account is to be taken of future salvage operations and of any future General Average contributions to which the ship would be liable if repaired.

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed the value on arrival.

The preceding section embodies the results of legal decisions of the last fifty years. The most important point which they determined is that the value of a ship, with which the cost of repairs must for the purposes of constructive total loss be compared, is the market value, and not the insured value. It is certainly singular that in a point so vitally connected with insurance the value specified in the policy should be ignored in deciding whether that very amount would have to be paid to the assured. Whatever the cause of this may have been, there is absolutely no doubt that unless provision to the contrary is made in the policy the comparison of repairing expenses would have to be made with the market value. Now, as the insured value of a ship usually considerably exceeds the market value, and as it is the amount fixed at the commencement of the insurance transaction, and is not dependent on variation of supply and demand, circumstances of the season, abundance or dearth of cargo to carry, it has become usual for underwriters to insist on inserting in their policies a clause known as the Valuation Clause, to the following effect :

The insured value shall be taken as the repaired value of the vessel in ascertaining whether there is a constructive total loss under this policy.

This clause appeared to conform in every respect to the sub-section of the Act now under discussion, but the House of Lords in the case of the *Araucania* (*Macbeth v. The Maritime Insurance Co.*, 1908 : 24 Times L.R. 403¹) decided that the true test of a constructive total loss of ship is what a prudent and insured owner would do in the circumstances (whether he would repair or sell), and that in the calculation necessary to arrive at this decision, the break-up value has to be taken into consideration. In consequence of this decision underwriters were compelled to revise the valuation clause and make it read :

In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

The regulations made in this section for estimating the cost of repairs do not state explicitly that the ship's contribution to general average shall be one of the deductions, but this is implied by the statement that no deduction is to be made of the general average contributions to these repairs payable by other interests. Further, it is distinctly stated that account is to be taken of the expense of future salvage operations, and of any future general average contribution to which the ship if repaired would be liable, thus excluding previous salvage expenses and contributions to General Average previously incurred.

In the case of goods there is no complication of this kind. The whole test is whether the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival there.

So far in the Act the words Constructive Total Loss have been used solely with reference to insurance, but in the following section they must be used in a wider sense, because it is in the contemplation of the Act that the assured, having suffered a constructive total loss, has his choice of treating

¹ The policy on which action was taken was issued in 1905 and expired in June 1906, before the Marine Insurance Act took effect.

the loss as total or as partial. The section reads as follows :

§ 61. Where there is a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the underwriter and treat the loss as if it were an actual total loss.

It is submitted that this would be better expressed by saying that the assured's claim will always be treated as a partial loss, unless he abandons the subject-matter insured to the underwriter and proves the existence of a constructive total loss in accordance with the terms of the preceding section.

The consideration of total loss having thus led up to the idea of abandonment, the Act now turns to the consideration of the latter, and enacts as follows :

§ 62. (1) Subject to the provisions of this section, where the assured elects to abandon the subject-matter insured to the underwriter, he must give notice of abandonment. If he fails to do so the loss can only be treated as a partial loss.

The insistence on notice of abandonment is based upon two grounds. When the assured has once elected to treat the loss as a total loss the underwriter can insist upon his abiding by the election so as to enable the underwriter to take the benefit of any advantage which may arise from the thing insured. Therefore the object of notice of abandonment is that the assured may tell his underwriters at once what he has decided, and not keep it secret in his mind waiting to see if there will be a change of circumstances. There is another reason: there may be various ways in which the subject-matter of the insurance may be profitably dealt with. Therefore the second reason for requiring notice of abandonment to be given to the underwriters is that they may decide and do what in their opinion is best, and make the most they can out of that which is abandoned to them as the consequence of the election which the assured has exercised (per Cotton L.J. in *Kaltenbach v. Mackenzie*, 1878).

§ 62. (2) Notice of abandonment may be given in writing, or by word of mouth, or partly in writing and partly by word of mouth, and may

be given in any terms which indicate the intention of the assured to abandon his insured interest in the subject-matter insured unconditionally to the underwriter.

As a matter of fact, tender of abandonment is so important an operation in Marine Insurance that it is very seldom given orally, and if so given it is almost invariably confirmed in writing. While the Act lays special stress on the unconditional character of the abandonment being indicated in the notice, it still gives no form which should or might be used by the assured for this purpose. Lord Ellenborough went so far as to say in *Parmeter v. Todhunter*, 1808, "The abandonment must be direct and express, and I think that the word *abandon* should be used to make it effectual." It is suggested that it is probably advisable that the tender of abandonment, whether oral or written, could contain or have attached to it some statement of the grounds upon which the tender is made, or some reference to the intelligence which has prompted the action of the assured.

§ 62. (3) Notice of abandonment must be given with reasonable diligence after receipt of reliable information of loss, but where the information is of a doubtful character the assured is entitled to a reasonable time to make inquiry.

"What is reasonable time in a case of this description must depend upon the particular circumstances of each case. On the one hand, the assured is not to delay his notice when a total loss occurs in order to keep his chance of doing better for himself by keeping the subject insured, and then when he finds it would be more to his advantage to do so, throwing the burden upon the underwriter; while, on the other hand, the underwriter cannot complain of a suspense of judgment fairly exercised on the part of the assured to enable him to determine whether the circumstances are such as to entitle him to abandon" (per Lord Chelmsford in *Currie v. Bombay Insurance Co.*, 1869).

§ 62. (4) When notice of abandonment is properly given, the rights of the assured are not prejudiced by the fact that the underwriter refuses to accept the abandonment.

This seems obviously equitable, because it starts on the assumption that timely notice was given, and that the tender

of abandonment was unmistakable, and was made on reliable information. The fact that the underwriter exercises his option and declines the abandonment ought not in any way to involve the assured in a worse position. Should it turn out eventually that the assured is justified by the amount of expenses and the cost of the repairs in his contention that there was a constructive total loss, then his position ought not to be worsened by the fact that the underwriter could not, or would not see things in the same light. For example, a ship is sunk in deep water in harbour. The assured tenders notice of abandonment which is not accepted. The underwriter proceeds of his own accord and at great expense to save the ship which he recovers. The opinion of the Court was that the notice was valid and the assured was entitled to receive payment of a total loss (*Ship Blairmore v. Macredie*, 1898).

§ 62. (5) The acceptance of abandonment may be either express or implied from the conduct of the underwriter. The mere silence of the underwriter afterwards is not acceptance.

As a rule, in practice the reply of the underwriter is in writing and is unconditional and absolute. If the underwriter begins to take such charge of the subject-matter insured as is not consistent with any relation to that subject-matter except ownership, this would lead to a reasonable conclusion that he had accepted the abandonment. If abandonment were tendered orally it might not be easy to keep from giving a reply affirmative or negative, but if the tender has been in writing the underwriter has the option of accepting definitely, declining definitely, or doing nothing, which in the case of an abandonment is understood to mean that he declines to accept it. In modern practice it has become difficult to decline silently, because the tenders of abandonment now current usually contain a clause in which the assured asks that the underwriter, in case he declines the abandonment, shall put his assured in the same position as if a writ had been issued against the underwriter on the day on which abandonment was tendered. Such a communication, of course, demands a reply. The only result of not giving it would be that the assured, to secure

his position, would get writs drawn and perhaps issued to his underwriters with the object of fixing the date, the state of affairs at which is to determine whether there is a total constructive loss or not. For in England it is the state of affairs at the time of taking action, and not the state of affairs at the time of tendering abandonment, that is decisive. In Scotland it is the other way, and the Scotch practice has the support of most, if not all, of the Continental maritime nations. And according to Phillips, Section 1633, in the United States the validity of the abandonment depends upon the state of the facts at the time when the abandonment is made.

§ 62. (6) **Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.**

It has been seen above that silence on the part of the underwriter to whom abandonment has been tendered does not mean acceptance ; he is regarded as steadily refusing to accept abandonment, however often it may be tendered, up to the moment when he definitely declares his acceptance, which is in consequence held to imply not only liability for the loss but also an admission of the sufficiency of the notice. It does not necessarily follow that this means the sufficiency of the grounds on which the notice is based, for instances have occurred in which underwriters, believing that abandonment was tendered on insufficient grounds, have nevertheless accepted it, and have in the result shown that a profit could be made out of the real value of the property even after taking into consideration the total loss they had paid. But if the underwriter has thus the disadvantage of never being able to initiate an abandonment he is in return put by the law in a strong position with regard to abandonment tendered to him and accepted by him. The assured is left no option of withdrawing his notice if once accepted, any more than the underwriter has of withdrawing acceptance after he has once intimated his assent. For example, in *Smith v. Robertson*, 1814, the broker gave notice of abandonment to the underwriters the day after receiving intelligence of the ship's capture. On the fifth day afterwards the

underwriters notified the broker that "they were satisfied," this being the form in which they accepted abandonment. On the same evening advice was received of the ship's recapture, and shortly afterwards she was brought into port, discharged her cargo, and earned her freight. Lord Eldon held that the underwriters could not be allowed to say "that the loss was not total after they had admitted that it was, and acquiesced in the abandonment as for a total loss."

§ 62. (7) **Notice of abandonment is unnecessary where, at the time the assured receives information of the loss, there would be no possibility of benefit to the underwriter if notice were given to him.**

This paragraph is perfectly simple and is completely satisfactory so long as the assured can satisfy the underwriter that when the news of the loss reached him there was no possibility of benefit to the underwriter if notice were given to him. The difficulty lies in the word "possibility." And it is evident that no weaker word can fill its place, because anything like "probability" or "likelihood" reduces the standard from actual occurrence or objective fact to personal opinion or subjective impression. In the former case the parties would be *ad idem*: in the latter they would almost certainly differ. It seems as a matter of practical business much safer for the assured not to rely too completely on the apparent dispensation granted in this clause.

§ 62. (8) **Notice of abandonment may be waived by the underwriter.**

(9) **When an underwriter has reinsured his risk, no notice of abandonment need be given by him.**

It has been stated in some of the text books that the reason why a reinsured underwriter need not give notice of abandonment to his reinsurer is that this is only one instance of the general ground of "no benefit, etc.," dealt with in Sub-section 7. Another reason is given by Phillips, Section 1506, namely that the reinsured underwriter could not abandon without accepting the abandonment of the assured, since he otherwise has nothing to abandon. Is it not quite as likely that the rule has risen out of a recognition of the identity in interest between the original underwriter and the reinsuring underwriter, and of the transference to

the matter of abandonment of the spirit in which all re-insurance is carried on, as is shown by the wording of most Marine Reinsurance policies: "Subject to the terms and conditions of the original policy or policies and to pay as may be paid thereon"?

§ 63. (1) Where there is a valid abandonment the underwriter is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental thereto.

The content of this clause will repay careful consideration. First of all, it assumes the occurrence of a valid abandonment, a case in which the assured has tendered and has justified abandonment, and the underwriter has consequently paid a total loss. The latter is thereupon entitled to assume the same rights and relations in and towards what remains of the interest insured as the assured originally had in and towards that same interest; he is entitled but not compelled to do so, and he is permitted to assume all proprietary rights incidental thereto, but he is not forced to undertake any proprietary liabilities. For example, a steamer goes badly ashore within the limits of a port whose controlling authority is entitled by its parliamentary powers to order the owners of ship and cargo to remove them as being obstructions to navigation, or objects threatening to become such, in default of which the port authorities are entitled themselves to remove, destroy, or disperse the property, having a first lien upon the same for the expense of the operations. If the underwriter perceives that the liabilities will exceed the value of the salvage recovered, or that they are such as may be recovered from a third party (e.g. a defaulting ship causing collision resulting in the vessel run down being beached in a dangerous position in the harbour), he may exercise the option conferred in this clause and allow the matter to take its course between the harbour authorities and the stranded property, or the defaulting steamer, or the underwriters with whom the protection and indemnity liabilities of the steamer were insured. There is a series of cases commencing with *The Earl of Eglinton v. Norman*, 1877, all tending to establish

that the "owner" who, by the general Harbour Acts of 1847, or the similar acts of local dock authorities, is the shipowner to whom the vessel belonged when she was wrecked, and not the underwriter on the ordinary marine policy who has paid a loss. But where the owner has abandoned the property and it has not been taken up by the underwriter, it remains to be treated by the authority in whose jurisdiction it lies as owned by nobody and as trespassing on the authorities' premises. Any surplus remaining to the harbour-authority, after the payment of the expenses out of the value of the property saved, has to be handed over by them to the owner in question, who in turn has to hand the amount over to the underwriters who have paid him a total loss. It appears therefore that the rights and relations of the underwriter in and to abandoned property involve in some respects complete subrogation (regarding which more will be said later), and in others freedom from the liabilities which complete subrogation would bring.

§ 63. (2) Upon the abandonment of a ship, the underwriter thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty ; and, where the ship is carrying the owner's goods, the underwriter is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.

When abandonment is accepted the assured is divested of all his proprietary rights in the ship and in any engagements she may have. Therefore, unless provision is made to the contrary in the policy, the underwriter's acceptance of abandonment brings with it the right to receive any freight that is earned by the ship on the voyage she was making when abandoned. But he cannot usually accomplish this without completing the venture in the abandoned ship. In which case it is not clear that the original assured ship-owner acquires any right of recovery against his freight underwriter, as in consequence of the completion of the voyage on the original bottom there has been in fact no loss of the insured freight from perils of the seas, but only in consequence of abandonment. But as the gross freight

per Bill of Lading is not earned without expense, it is enacted that the expenses incurred subsequent to the casualty are to be deducted from the freight received by the underwriter.

By "freight in the course of being earned" is meant freight at risk in the course of being earned. Freight prepaid absolutely is not transferred to the underwriter, but freight prepaid on account of the total due at destination would be included in the transfer. In either case the only expenses deducted would be those incurred after the disaster. The provisions thus made regarding freight of merchant's cargo carried by an abandoned ship, are made to apply equally to shipowner's goods carried on his own vessel. The only difference is that instead of dealing with the freight in course of being earned, the amount dealt with is a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss. In all these cases the cargo must be forwarded in the original bottom, for it was decided in *Hickie v. Rodocanachi*, 1859, that when a ship is condemned at a port of refuge, and the freight is earned by a substituted ship, the underwriters of the first ship are not entitled to any part of that freight. It is this decision that is embodied in the words "Earned by *her*."

PARTIAL LOSSES

(*Including Salvage, General Average, and Particular Charges*)

§§ 64-66

§ 64. (1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.

In Section 56 it is enacted that any loss other than a total loss as defined in the Act is a partial loss. The present section divides partial loss into two classes: Particular

Average Loss and General Average Loss. By the latter is meant a loss of an interest to which contribution is made by the other interests involved in the venture when the venture arrives at destination. Consequently we may put it that a Particular Average Loss is a loss which is caused by a peril insured against, but is not a total loss and remains borne only by the underwriter of the interest on which it falls. Most of the definitions of Particular Average given in the text-books fail in that they have defined Particular Average in words which correctly express a merchant's partial loss in a sea venture, but not an underwriter's liability on his policy covering the merchant's interest in that venture. If it were possible to restrict the words "Particular Average" to insurance use only, we would get rid of the awkward phrase "Particular Average Loss," whose redundancy has repeatedly been pointed out. The definition given above may be expanded in a form somewhat similar to what follows, so as to give a fuller account of what is comprised in the extremely terse form employed in the Act:

Particular Average is the liability attaching to a Marine Insurance Policy, in respect of loss of part or damage (diminution or deterioration) not recoverable from the other interests concerned in the venture, but accidentally and immediately caused by one or more of the perils insured against to some particular interest (as the ship alone or the cargo alone) which has arrived at the destination of the venture.

Of course both diminution and deterioration may occur to the same interest. There are thus three possible varieties of Particular Average : (a) Diminution of quantity, (b) Deterioration of quality, (c) Diminution of quantity and deterioration of what remains. The extent to which the underwriter becomes liable for merchant's loss or damage is discussed in later sections of the Act dealing with the Measure of Indemnity. The loss just described is a loss in or of the subject-matter insured. It is what is called in French law a physical or material particular average (*Avarie particulière matérielle*). On the other hand, the assured may incur expenses in his safeguarding the subject-matter of the insurance against one or more of the perils insured, without

doing anything that would entitle him to claim contribution from all the other interests to the venture. Such expenses in French law constitute a particular average in costs (*Avarie particulière en frais*). This class of expense is not admitted by English law as particular average, but is described in the Act as Particular Charges. One result of this distinction is that particular charges cannot be added to particular average so called, so that if the policy contains stipulations making it free from average under a certain named percentage or amount, particular charges cannot be added to particular average to establish a claim exceeding the franchise. As specimens of such particular charges the following may be given :

(1) A shipment of Manchester goods insured each bale as a separate interest with average payable if exceeding 3 per cent. One bale lost overboard in transhipment is recovered and brought ashore by the ship's crew at a cost of $\frac{3}{4}$ per cent of the cost of the bale. The bale itself is sold and shows a loss of $2\frac{1}{2}$ per cent of its value. Although the particular charges and the particular average taken together exceed the franchise by $\frac{1}{2}$ per cent, this amount cannot be claimed from the underwriters, who are only liable for the particular charges of $\frac{3}{4}$ per cent. This illustrates what is meant by the statement of the Act that particular charges are not included in particular average. But it will be discovered further on that particular charges form only a small proportion of those incurred by or on behalf of the assured for the safety or the preservation of the subject-matter insured, because far more cases occur in which the said interest is regarded as merely one item in the whole venture, all affected by the same acts and liable to contribution for their cost, than those in which it is the sole interest concerned. This consideration leads us to Salvage Charges and General Average.

§ 65. (1) Subject to any express provision in the policy, salvage charges incurred in preventing a loss by perils insured against may be recovered as a loss by these perils.

(2) "Salvage charges" means the charges recoverable under maritime law by a salvor independently of contract. They do not include the expenses of services in the nature of salvage rendered by

the assured or his agents, or any person employed for hire by them, for the purpose of averting a peril insured against. Such expenses, where properly incurred, may be recovered as particular charges or as a general average loss, according to the circumstances in which they were incurred.

There exists a great confusion in the meanings attached to the word "salvage" in commerce and even in insurance. It is used to mean the act of saving goods at sea, the reward paid for such saving, the goods themselves after being saved, the net profit to the concerned resulting from the saving of goods. By its definition of salvage charges the Act draws a further distinction in that it discriminates between the charge for salvage which a salvor "on speculation," working on his own account, and independently of any one concerned in the venture insured, can recover under maritime law, and the expense of services directed towards the same end rendered by the assured or his agents, or any person employed by them for hire. This distinction goes so far that salvage charges properly so called incurred to avoid a loss by perils insured against are recognised by the Act as recoverable as a loss by these perils. From this it follows that they can be added to material loss in order to make up a claim attaining or exceeding the franchise stipulated in the policy. On the other hand, as we have already seen in dealing with the preceding section, the reward or hire for certain cases of efforts successfully made by persons under contract or hire, resulting in the saving of goods, are merely particular charges, and as such are by Statute not permitted to be added to material damage in order to attain the necessary franchise. Other services with the same object in view being rendered to the particular interest insured, concurrently with and inseparably from all the other interests concerned in the venture, fall under an entirely different set of considerations and regulations, being known as General Average. It is respectfully suggested that the use in Section 65 (2) of the words "services in the nature of salvage" is a misfortune, as they really conceal rather than explain the distinction intended to be drawn between the speculation salvor and the hired recoverer of imperilled property. A much more serious instance of

the same confusion has arisen in connection with General Average, where attempts have been made to draw a line between General Average expenditure and expenses of the nature of General Average.

§ 66. (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such a contribution is called a general average contribution.

The liability dealt with in the three preceding subsections is in its origin quite independent of Marine Insurance, being an obligation arising out of the contract of affreightment. The law of General Average is primarily an outlying branch of the law of affreightment, and it cannot be satisfactorily treated except with constant reference to the law of affreightment. It is only at the very last stage that its connection with insurance comes in and any attempt to import insurance considerations at an early stage of matters of General Average results in confusion and complete misunderstanding. The idea of General Average seems to have arisen in the Mediterranean. In one of the earliest fragments of sea law preserved to us we find a reference to the Rhodian law, as providing that there shall be a general contribution for sacrifices made in time of danger for the general benefit. The instances given being jettison of goods, the tearing out of the mast for safety's sake, goods lost after discharging into boats for the sake of lightening the ship. As these instances are given in the *Sententiae* of Paulus, written about A.D. 200, it is obvious that the Rhodian law was referred to as a well known regulation. It is again referred to in Justinian's *Digest*, issued about A.D. 530. The second title of Book xiv. is headed "On the Rhodian Law respecting Jettison," and contains the following statement of the words of Paulus :

By the Rhodian law it is provided that when a jettison of goods takes place for the purpose of lightening a ship, that which has been jettisoned on behalf of all is restored by the contribution of all.

From comparison of the passage of Paulus' *Sententiae* with the passage of Justinian's *Digest*, the conclusion has been drawn that the Rhodian law referred to did not, prior to A.D. 200, deal with any kind of sacrifice except jettison, and that all the extensions of the system of contribution to other sacrifices and expenditures was the work of professional lawyers, applying the principle which they believed underlay the case of jettison. The same kind of development can be observed in the history of European law on General Average, and it is seen going on from day to day. It is difficult for us now to realise "that *prima facie* all losses occurring in the course or in respect of navigation lie where they originally fell" (Ashburner, *Rhodian Law*, p. ccli. with a reference to *Consulate of Sea*, c.c. 152, 187; *Targa*, p. 322). Examination of the English policy of insurance discloses a curious parallel to what is suggested above as the history of the Rhodian law, namely, the fact that the policy mentions specifically no peril of a general average character except jettison. The Rhodian law which we possess at present seems to date from some time between A.D. 750 and 900.

As far as modern English practice and decisions are concerned, it may be taken that all current ideas on the subject of general average date from the decision of Mr. Justice Lawrence in *Birkley v. Presgrave*, 1801, in the course of which he said :

" All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested."

It is worth remarking that he mentions solely ship and cargo, leaving out of consideration the third great maritime interest, freight. The stipulation occurring in Sub-section 3, that the conditions imposed by maritime law shall be enforced, refers to such matters as the jettison of goods not carried under deck, or of goods in a condition dangerous

to the rest of the cargo, for which by the general consent of maritime nations no contribution is exacted. But this is the only indication given in the Marine Insurance Act of the wide divergence of the laws of different nations regarding the sacrifices and the expenditures made good in general average, and the method of ascertaining the amount to be contributed by the various benefited interests. There is one matter of essential difference ; while in English law no sacrifice or expenditure is regarded as General Average unless it has been incurred for the common preservation of ship and cargo, nearly all foreign laws admit as General Average expenses incurred for the benefit or furtherance of the common venture ; in other words, to be admitted in general average in English law a sacrifice or expenditure must have for its object the physical safety of the venture : in most foreign law it is sufficient if the object is the furtherance and completion of the voyage.

The liability for contribution to general average is a common-law liability, so that it does not at all follow that the underwriter is on his policy of insurance liable for the amount due by the subject-matter assured to the other interests in the venture. This may arise either from difference between the value at which the subject-matter is rated for contribution and that for which it is insured, or it may arise from special conditions or exceptions made in the contract of insurance through which the underwriter's liability is made less in extent than that of his assured.

§ 66. (4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the underwriter in respect of the proportion of the loss which falls upon him ; and, in the case of a general average sacrifice, he may recover from the underwriter in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

If the insured value and the amount insured may be reckoned among the express provisions of the policy named in this sub-section, then the first part of the sub-section correctly states the equitable liability of the underwriter in case of a contribution for general average expenditure. It would obviously be unfair that the underwriter should

be called upon to contribute on the basis of a value exceeding that named in the contract between the assured and him. That value being as much a portion of the contract as any other express provision in the policy. But in the case of General Average sacrifices the Act declares that the assured may recover direct from the underwriter in respect of the whole loss without having previously enforced his right of contribution from the other parties liable to contribution. This is the result embodied in the decision in *Dickenson v. Jardine*, 1868. Until that date it was universally held that the liability imposed on underwriters under the name of General Average meant contribution to General Average. In the case of *Dickenson v. Jardine*, 1868, a shipment of 641 packages of tea was insured per *Canute*, from Foochow to London, including the risk of particular average, the policy in the usual form expressly naming jettison as one of the perils insured against. The vessel struck a reef, and in the efforts made to refloat her 607 packages of tea were jettisoned. The merchant claimed the insured value of these packages from his underwriters, who refused to pay, alleging that their only liability was for General Average contribution. It was held by the Court (Bovill C.J., Willes J., and Montague Smith J.) that the owner of the jettisoned goods having insured them against jettison *inter alia*, "has two remedies—one for the whole value of the goods against the underwriters, and the other for a contribution in case the vessel arrives safely in port; and he may avail himself of which he pleases, though he cannot retain the proceeds of both so as to be repaid the whole of his loss twice over." Consequently, if the owner of the sacrificed goods recovered the amount sacrificed in the shape of contributions from other interests in the venture, he was obliged to hand over those amounts to the underwriter who had already paid him a direct claim for loss of the same goods. Unfortunately, in the decision of *Dickenson v. Jardine*, it was not stated whether the direct liability of underwriters for loss by jettison came under the head of General or Particular Average, and most average adjusters stated direct claims for ship's sacrifices or sacrifices of cargo, as if they were claims for Particular Average, and

consequently subject to the special terms of the policy as to Particular Average. But in 1889 the Court of Appeal decided in *Price v. A1 Ships Small Damage Association*, that General Average sacrifices and Particular Average losses are so entirely different in character that they cannot be added together to make up the percentage of franchise stipulated in the policy. The result of this is that the direct liability of an underwriter for a General Average sacrifice is unaffected by the memorandum or any other warranty respecting Particular Average. • •

It is respectfully submitted that the whole development since the decision in *Dickenson v. Jardine* is based on a misconception. The reason why the assured in that case could recover from two sources was that the accident which happened was one of the perils specifically named in his insurance policy giving him a contract right to recover, and that he had at the same time a common law right to have his loss made good by contributions from others interested in the venture. But the fact that the latter right is a right in General Average does not seem to imply of necessity that the assured's direct claim against his underwriter must be a claim of the same class. Examination of earlier policies of insurance, such as the *Tiger*, the *Maria*, reveals no mention of General Average, although they both specify jettison. Similarly, although Lord Ellenborough in *Blankenhagen v. London Assurance*, 1808, stated that "fear of capture is not a risk contemplated under the policy," that did not prevent Chief Justice Abbot in *Butler v. Wildman*, 1820, from deciding that when the captain of a ship threw a large quantity of dollars overboard to prevent their falling into the hands of an enemy, the loss "if not strictly speaking jettison, is *ejusdem generis*, and therefore falls within the general words," thus showing the great virtue possessed by the specification of a peril in the policy. Consequently, it is submitted that had the casualty in *Dickenson v. Jardine* not been a named peril of the policy, there would have been no opportunity to resort to analogy and bring in the idea of a direct claim for General Average sacrifice, such as is now legalised by the enactment of Section 66, Sub-section 4.

§ 66. (5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the underwriter.

The remark made above with respect to insured value and the amount insured on the policy holds with respect to this sub-section.

§ 66. (6) In the absence of express stipulation, the underwriter is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of a peril insured against.

It is understood that this sub-section has been introduced in order to exempt English underwriters, using the form of policy given in the Schedule, from liability to contribution for general average for losses and expenses not arising from perils insured against in the policy. Such cases have actually occurred in the past. For instance, the collection as general average of an amount paid by cargo at destination abroad as an additional bottomry debt ; in which case the deficiency arose not from any peril insured against, but merely owing to the captain's want of funds. At Bremen, the port in question, deficiency of funds in these circumstances constituted a case of general average. Although the underwriter in this case was finally held liable, it was solely on account of the clause in his policy reading "To pay general average as per foreign statement, if so made up" (*Harris v. Scaramanga*, 1872).¹

§ 66. (7) Where ship, freight, and cargo, or any two of these interests, are owned by the same assured, the liability of the underwriter in respect of general average losses is to be determined as if these subjects were owned by different persons.

This sub-section gives an insurance-life to a liability which has no existence in common law or apart from insurance, for the owner of a ship could not sue himself as the owner of its cargo for the liability of the cargo to the ship for

¹ Similarly, when owing to the insufficiency of coal with which a steamer started on her voyage, no bad weather or other sea peril occurring or intervening in any shape or way, the master had to engage a trawler to tow her to her port of discharge, the Admiralty Court awarded £350 for this service, it was held that there was no claim upon a policy against sea perils (*Ballantyne v. Mackinnon*, 1896).

ship's sacrifices made for the common safety. But presumably in order that he may not be placed in a worse position with regard to insurance, the shipowner is permitted by this sub-section to receive from the underwriters on ship, freight, and cargo, the same contributions as would have been claimable from them if the shipowner and the cargo-owner had been different persons.

But there remains a still more difficult question, which has not been handled in the Act, the case of sacrifices of expenditures made on a ballast voyage. There are two varieties of such a voyage.

(1) A vessel may have no charter ahead.

(2) A vessel may be chartered for a voyage commencing at the end of her ballast voyage.

(1) In case of disaster involving sacrifices or expenditure there would only be one interest concerned, that is, the ship herself. And it is conceived that if those expenses were of the nature of salvage charges incurred to prevent a loss by a peril, they would, under Section 65, be recovered as a loss by that peril. If not salvage charges they would be, under Section 64 (2), particular charges.

(2) Would this case be adjusted as general average in agreement with the sub-section now under discussion? The sacrifice or expenditure necessary to put the ship in safety is not so directly connected with the chartered freight as with the vessel herself. The fulfilment of the charter depends not only on the vessel being brought into a position of physical safety after the sacrifice or expenditure in question, but also on her reaching her destination where the charter is to be taken up, and before the cancelling date stipulated in the charter-party. It is certainly fair to say that the relation of the chartered freight to the sacrifice or expenditure in question is not so immediate as that of the ship. The question is, is it too distant to entitle the ship to call upon the freight for a contribution? If a vessel is chartered for several successive voyages or for a period of months or years, to what extent are these forward engagements liable to contribution? These questions really belong to the law of General Average, and only arise in connection with insurance where ballast voyages are concerned.

MEASURE OF INDEMNITY

§§ 67-78

Having dealt in detail with the various classes of losses and misfortunes imposed upon the marine underwriter, the Act now proceeds to consider the Measure of Indemnity afforded to the assured by the underwriter in respect of these different classes of disaster.

It is worth observing that the policy form given in the first Schedule to the Bill gives absolutely no indication of the extent to which that liability may go or the principles upon which the amount of it is to be ascertained. That form having been adopted by English underwriters generally, both private underwriters at Lloyd's and elsewhere in London, at Liverpool, Glasgow, Hull, Newcastle, Cardiff, and Belfast, as well as by all the Marine Insurance Companies at their Home and Colonial Offices and agencies, and most of their foreign branches and agencies, must be regarded as the typical British policy of Marine Insurance, and is, in fact, accepted as such. But the sole indication of the force and effect of a policy, as stated in itself, is that "it shall be of as much force as the surest writing or policy of insurance heretofore made in Lombard Street, or on the Royal Exchange, or elsewhere in London." What exactly constitutes the full force and effect of the contract has been discovered from the decisions of the law courts in the course of the three hundred and fifty years during which this form of policy has prevailed. Consequently, in dealing with the measure of indemnity granted by a Marine Insurance policy, we are dealing with a tradition which can be traced back to August 1555. The tradition in question is embodied in a clause of the earliest policy yet discovered in English, copied in the file of *De Salizar* (or *Salazar*) v. *Blackman* (Admiralty, File 29, No. 45). No such clause is found in the Italian form prescribed by the Statute of Florence, dated 28th January 1523, as the standard form for all underwriters within the jurisdiction of Florence. It is indeed difficult to gather from that form what risks, if any, except total loss arising from named perils, were recoverable. But at its close there is a clause by which the underwriters

submit themselves to the office of the five official deputies on insurance and to every other judgment and court, whither the assured shall please to summon them. The terms of this submission are obviously wide enough to admit partial losses of any character that commended themselves to the official deputies or the Courts as being legally, necessarily, or reasonably within the limits of the indemnity due to the assured from his underwriter. An investigation of Florentine archives might yield valuable results on this point.

The succeeding clauses of the Act, Nos. 67 to 78, give, for the first time in English legal history, statutory provisions embodying the customary rules by which the amount of the indemnity on a marine policy was previously regulated. As the policy was primarily drawn to embody the relations between individual underwriters and the assured, the sections of the Act now under consideration have been primarily drafted so as to suit individuals acting in these capacities, as well as insurance companies who may take burden either for part of a customer's risk, or for the whole. The Act reads as follows :

§ 67. (1) The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy, is called the measure of indemnity.

(2) Where there is a loss recoverable under the policy, the underwriter, or each underwriter if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

The term "Measure of Indemnity" is a most useful addition to the vocabulary of insurance. Until it was adopted in the Act, people were accustomed to talk in a vague way about the amount recoverable on the policy without distinguishing clearly between the various ways in which that phrase can be interpreted, whether as the amount legally fixed as all that can be recovered on a policy of that character, or all that the assured can obtain in consequence of his acceptance of certain clauses or sub-

sidiary conditions in his contract. The application of the phrase "Measure of Indemnity" to Marine Insurance contracts has certainly resulted in great improvement in the clearness of expression and comprehension of the intentions contained in contracts of Marine Insurance.

§ 68. Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,—

- (1) **If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy :**
- (2) **If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.**

The preceding section is effective for all subjects of Marine Insurance, except such as are insured on policies excluding definitely or by inference the risk of total loss. The words "Valued" and "Unvalued" policies have been defined in Sections 27 and 28 above, and "Insurable Value" is defined in Section 16. The clause seems to want a certain expansion to provide for such cases as those mentioned further down in Section 77, viz. Cumulative Losses, or cases of repaired damage followed by a total loss on the same voyage and policy. Probably the insertion of the words "for one casualty" after "indemnity" would be the least objectionable form of emendation; further details will be given in the consideration of Section 77.

§ 69. Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy, is as follows :—

- (1) **Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty :**
- (2) **Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage, computed as above :**
- (3) **Where the ship has not been repaired, and has not been sold in her damaged state during the risk, the assured is entitled**

to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage, computed as above.

The first point to be remarked in connection with the preceding section is, that in its second phrase it implicitly recognises the absolute freedom that has been granted to assured and underwriter alike to settle the terms of the contract between them with regard solely to their own convenience. It is true that very often it must appear to those unacquainted with the practice of Marine Insurance that underwriters and assured alike cling with almost unreasoning tenacity to the terms of contract that have become usual in the history of the insurance of certain interests.¹ But the unwillingness to accept changes in this respect does not arise from any sense of the illegality of any other form or terms of contract, but rather from an appreciation of the truth that in all contracts the matter of the first necessity is that there should be as far as possible complete certainty that the parties to the contract are of the same mind, *ad idem*, respecting its terms. There is no law compelling the deduction or attainment of certain franchises, but there is an almost universal custom to recognise certain franchises by the expressed and explicit wording of the policy, and the right to frame such expressed and explicit conditions is throughout this Act preserved to the parties concerned in a marine insurance contract.

Before taking the sub-sections in their order, we have to notice first that the subject of the whole section is Ship, and specially Ship damaged, but not to the extent that she is absolutely irreparable (which would constitute a case of actual total loss), or irreparable except at a cost greater than her value when repaired (which would constitute a case of constructive total loss).

Sub-section 1 provides that in cases in which the ship has been fully repaired the assured is entitled to claim the sum (inferior to the insured value) to which the reasonable cost of repairs, less the customary deductions, amounts.

¹ The effect of the words of the memorandum in the form of policy given in Schedule 1, is more conveniently considered in connection with § 71 of the Act.

It is not inconceivable that on one voyage (that is, during the period of time spent by her on the loading, carrying, and discharge of two cargoes) a ship might have a disaster to the extent of 50 per cent in the earlier outward half voyage, and one of 60 per cent or 70 per cent in the later homeward part voyage. But in all cases in which the earlier casualty to the extent indicated occurred before the discharge of the first cargo, it is practically certain that repairs would be effected before the homeward half of the voyage was commenced, while the damage arising out of the second disaster would be separately repaired during or after the second half voyage. On the other hand, if the two disasters to the extent indicated occurred both in the first or both in the second half voyage, then the repairs might be effected *separately*, either both at ports of refuge, or the one at a port of refuge and the other at a port of discharge; or they might be effected *cumulatively* at a port of refuge or at a port of discharge. It is submitted that in the case of cumulative repairs there is, according to the provision of this sub-section, no escape for the assured from the choice between the acceptance of a constructive total loss or the receipt of a sum less than the amount for which the combined damages can be repaired. In other words, two particular averages falling on one policy, the repairs for which are performed cumulatively at a cost exceeding 100 per cent, cannot be collected from the underwriter. The same seems to be true if the number of disasters on the part voyage is three or more. (See further, Section 77 on Successive Losses.)

Next must be considered what is meant by the words "Reasonable cost of repairs." It is worth remarking that the word "reasonable" has been retained in the Act in spite of an objection made to it during the discussion of the Bill. There is no doubt that there are cases in which it is difficult for the assured to control the reasonableness of the charges even when there is not the slightest suggestion of any intention of the assured to commit or even condone a fraud on the underwriters. The question will then be whether the sum claimed is the amount "properly expended in executing the necessary repairs," to use the words employed

by Lord Justice Cotton in *Pitman v. The Universal Marine Ins. Co.*, 1882. Consideration of this dictum involves our determining what expenditure is proper and what repairs are reasonable. In cases where it is possible to get repairs effectively carried out by two or more firms, it is not reasonable in ordinary circumstances to put the work into the hands of any one firm without asking for tenders from others. In determining from the tenders received which is the proper one to accept, regard must be paid not only to the price given by the firms for the actual material and labour required, but also to the time needed by each separate firm for the accomplishment of the work. The question of time is an important one not only to the underwriter but also to the shipowner. To the former it means difference of dock dues between a longer and shorter period. To the latter it means extra time of unemployment in consequence of the period consumed in repair. To put a stop to the abuses that have arisen in connection with repairs put in hand without calling for tender, English underwriters some years ago devised what is known as the Tender Clause. Under this clause underwriters bound themselves to make good to their assured at a very substantial price the value of any time which he could show to be lost in waiting for tenders for repairs. On the other hand, the owner is by the clause subjected to certain penalties in case he does not accede to the request of his underwriters to take the desired tenders. It is often found, even in cases where the repair for all visible damage has been tendered for, that the removal of damaged parts of the ship discloses previously hidden damages, which of course would not form part of the subject of contract unless it were distinctly agreed that the tender was to include all repairs to undiscovered damage. In such a case the parties would have to fall back on the words of the Act and make proper charges for the necessary repairs of the previously unrevealed damage. There is a form of contract which is perfectly simple as regards the cost per unit of material and of time. It specifies the invoiced price per ton or cwt. for the material required, plus named percentages for establishment charges and profit, while with respect to labour it specifies the rates

of wages prevalent at the port plus an agreed percentage. If to these provisions is added an agreement respecting the number of days in which the work is to be completed, there are then gathered all the factors necessary for a complete contract, assuming that there is no waste as regards material and no extravagance or slackness with regard to workmen's time. This leads up to the question of overtime.

It is necessary to distinguish clearly between the two classes of cases in which the charges for overtime occur, it being assumed that in both classes the repairs are being executed on account of a shipowner who is fully insured:—

(1) Charges for overtime for artizans and for labourers, and for their superintendents or overseers, incurred to prevent the incidence of still greater charges in connection with the repairs which would be incurred in case of delay beyond a certain date.

The stock instance of this class is the payment of wages of workmen for night, holiday and Sunday work, to enable the vessel to leave the dry dock where she is being repaired after the shortest possible stay in it. It is obvious that if repairs effected only during the day time would last so long as to run the vessel into another period of dry dock dues, usually a neap, it is a good economy, as a rule, to incur the extra charge for work done out of ordinary hours, as this extra amount is far exceeded by the saving of dry dock dues.

(2) The second class of cases is best represented by that of the mail steamer advertised for months ahead to sail on a certain date, her owners having made contracts, not only for carrying cargo, but also for the conveyance of passengers and mails. It is obvious that in this case, in addition to any economy of the first class that may be saved by overtime, there is a great additional inducement to the owner to get the work completed as early as possible, not in order to save other expense, but in order with the certainty of additional expense to enable him to fulfil his contracts for carriage of cargo and mails, and the conveyance of passengers. In this case it is more difficult to say what portion of the extra charges should be put to the debit of underwriters as constituting part of the "reasonable cost of the repairs."

Underwriters have in the past maintained that it was not reasonable to charge them with any portion of expense incurred not to produce effective economies, but solely to enable the vessel to keep her engagements. The shipowners have usually replied that the risk was offered to the underwriters and accepted by them as a risk on a vessel whose employment was known to be exacting as regards keeping time, and that the underwriters therefore implicitly took liability for all reasonable charges incurred in order to help her to retain this commercial character. As a matter of fact underwriters have been liberal in meeting cases in which the refusal to concede the payment of overtime would have involved considerable hardship to the assured. But so long as the remuneration of the underwriter consists solely of the premium paid for insurance and not of a share in the profits in the engagements saved by the incurring of overtime, it is difficult to see how the imposing of the total charges for overtime on him can fairly be justified. Lowndes,¹ after suggesting that the difficulty arises from the erroneous notion that a ship has a sort of value in some way separable from the value of her future earnings, solves the question by the resuscitation of the prudent, reinsured owner, while M'Arthur² admits the claim on the underwriter "so far as it is usual in the trade to adopt such means for securing despatch," but rejects it if the expenditure is unusual or excessive. It is submitted that the theoretically true solution is to divide the charges for overtime between the shipowner and the underwriter in proportion to the benefit derived by each of them from these charges. By this method also the question of a partly insured owner's proportion of charges for overtime would settle itself.

The next point that presents itself for consideration is up to what pitch are repairs to be done? In other words, what is the test of the completion of repairs? The repairs of damage of the nature of Particular Average are confined to what will put the vessel in the same state of efficiency as she was in before the accident which rendered these repairs necessary. That does not necessarily mean the exact replacement of everything in and about her in its former

¹ *Law of M.I.*, 2nd ed. p. 192.

² *Contract of M.I.*, 2nd ed. p. 233.

position and condition ; it does not mean what is called in fire insurance "reinstatement." The repairs will have fulfilled all that the assured is entitled to exact if it results in making the ship (in the words of Lowndes, *Law of M.I.*, p. 191) "as strong and durable and as good a carrier"—a ship which shall be as fit either to keep or to sell as she was before. There is thus no reference to any standard but that of equal efficiency, no reference to the requirements of Lloyd's Registry, or any other classification body. Consequently, when repairs are said to be based on the requirements of the Surveyors to Lloyd's Registry, or some similar corporation, underwriters are entitled to go behind the surveys of these officials and to demand proof of the condition in which the vessel was on the day that the accident occurred. Should the repairs necessary to put the vessel in that condition not be sufficient for the requirements of the registration body, then the repairs may proceed concurrently on both accounts, but the adjuster will have to determine how much falls to be paid by the underwriter in respect of the damage repaired, and how much by the shipowner in connection with the qualification of his ship to retain her class. This matter will come up for discussion later under the heading of Concurrent Repairs.

Further, the Act provides that the reasonable cost of repairs shall be "less the customary deductions." Here we have in the very words of the Statute an incorporation of a whole mass of commercial usage of such antiquity that it can almost fairly be called customary commercial law. Phillips¹ says at Section 50 :

"It is a general *custom*, in adjusting losses on the vessel, to deduct one-third of the expense of labor and new materials in repairing or replacing parts of the vessel injured or destroyed by the perils insured against, on account of the new or repaired part being better than the old. This is designated THE ALLOWANCE OF A THIRD FOR NEW. It is understood as not being applicable to a new anchor, and heretofore was not applied to a new chain-cable, this exception being made, when such cables were first introduced, for the purpose of encourag-

¹ *Law of Insurance.*

ing the introduction of them, but the third is now deducted. The deduction is not made by some underwriters on copper sheathing during the first voyage."

Later in his work Phillips says at Section 1431:

"Where timbers or other materials are replaced by new, the vessel when repaired is considered to be better than before; and accordingly the assured must himself bear one-third part of the expense of the labor and materials for the repairs, and this deduction is said to be on account of '*new for old*,' the insurers being liable for only two-thirds of the cost of the labor and materials. Mr. Justice Story says: If the difference between the value of the vessel when repaired and its value before the damage were to be ascertained in each particular case by actual inspection and estimates, there would be no end of controversies; and therefore general usage, which the law follows as founded in public convenience, has applied a certain rule to all cases. It is true here, as observed by Lord Mansfield on another occasion, that it is of less importance how the rule is settled than that it should be settled."

The deduction of thirds was quite appropriate in the days of wooden hulls, masts, spars and vegetable cordage, but when, after the short period in which composite ships were built, the material of the ships of the world was changed from wood to iron or steel, it was felt that some modification of the thirding rule became necessary, and there was introduced into the policy for hulls a clause, "No thirds new for old to be deducted from the repairs for ironwork, whether the average be particular or general." As very soon the whole of the material of a ship, except the fittings of cabins and the linings of crew spaces, consisted of metal, underwriters agreed, largely for the sake of uniformity, to accept a clause by which they abandoned entirely the deductions of thirds whether the average was particular or general. The result of this was somewhat curious. These self-denying clauses were clauses of the nature of a special contract, and did not in any way supersede the customary law of England generally applicable to such repairs, the result

being that, while in Particular Average the deduction of thirds might entirely be ignored, it was necessary for the proper protection of the interests involved in General Average other than the ship to make these deductions, which could be legally enforced in consequence of their being part of the custom of General Average. Consequently, when a general average was adjusted and thirds were deducted, the adjuster, in stating the incidence of the claim on the policies by which the ship was insured with the no thirds clause, had to introduce at the end an additional item charging the ship's underwriters with the ship's proportion of the thirds previously deducted. The scale of deductions employed in general average is the subject of two of the Rules of Practice (No. 53 and No. 28) of the Average Adjusters' Association as follows :

53. PARTICULAR AVERAGE ON SHIP

Deduction of one-third.—The deduction for new work in place of old is fixed by custom at one-third, with the following exceptions :

Anchors are allowed in full. Chain cables are subject to one-sixth only.

Metal sheathing is dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour of metalling are subject to one-third.

The rule applies to iron as well as to wooden ships, and to labour as well as material. It does not apply to the expense of straightening bent iron work, or to the labour of taking out and replacing it.

It does not apply to graving dock expenses and removals, cartages, use of shears, stages, and graving dock materials.

It does not apply to a ship's first voyage.

N.B.—Articles belonging to, or repairs done to a ship other than an iron ship allowed in general average, are subject to similar deductions in respect to new for old materials as are made in adjusting claims of particular average on ship.

28. GENERAL AVERAGE: IRON VESSELS

Deductions from Cost of Repairs to Iron Vessels in adjusting General Average.—In adjusting claims for general average, repairs to iron vessels shall be subject to the following deductions in respect of "new for old," viz. :

From date of Original Register—

Up to 1 year old.—(A) All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.

Between 1 and 3 years.—(B) One-third to be deducted off repairs to and renewal of boilers and their mountings, woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, ropes and hawsers, chain cables and sheets, donkey engines, steam winches, steam cranes, and connections; other repairs in full.

Between 3 and 6 years.—(C) Deductions as above under Clause B, except that one-sixth be deducted off iron work of masts and spars, and machinery other than boilers.

Between 6 and 10 years.—(D) Deductions as above under Clause C, except that one-third be deducted off iron work of masts and spars, repairs to and renewal of all machinery and all hawsers, ropes, sheets and rigging; one-sixth to be deducted off chains and cables.

After 10 years.—(E) One third to be deducted off all repairs and renewals, except ironwork of hull, and cementing; anchors to be allowed in full. One-sixth to be deducted off chain cable.

Generally.—(F) The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the vessel, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of the accident. No deductions to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use.

The mention of the change of material of which vessels were made from wood to metal (p. 134) and the reference to painting and scraping made in the Rules of Practice cited above, render it desirable that some account should be given of the reasons for admitting claims for scraping and painting the vessel's bottom. Although at the first blush it seems quite reasonable to expect that wooden vessels were succeeded by vessels partly wood and partly metal, and that these in their turn were succeeded by vessels entirely of metal, this order of succession is not in entire

SCRAPING AND PAINTING

agreement with the facts, and there is a good natural reason for what at first appears to be a case of irregular development. The strict historical fact is that the wholly metal vessel did actually succeed the wooden one, but its existence was so imperilled by the disadvantage of fouling and corrosion in actual service that some means had to be found either of preventing the attachment and growth on iron and steel surfaces of marine plants and animals, which attach themselves with great facility to iron and steel in all waters, especially in tropical seas, or of continuing the use of copper sheathing such as had been found an excellent preventive of such growths as well as of the ravages of the ship worm (*Teredo navalis*). It was in consequence of this disadvantage that for long after iron had supplanted wood the "composite" system was followed. Ships built on this system resembled iron ships in all respects except that they had wooden planking, keels, stems, and stern posts, the wooden planking enabling the bottoms to be sheathed with copper. But in many respects this combination of materials failed to be successful, and innumerable attempts were made to remedy or prevent the fouling of the bottoms of ships built wholly of metal. The most successful results were attained by the use of paints or compositions specially compounded to destroy any marine life that attaches itself to the submarine surface of the vessel. The period of efficiency of such a coating is, roughly speaking, six months. But if the vessel gets into such trouble that she has to be dry-docked for any length of time it is found that the exposure of this composition to the air instead of fluid surroundings hastens the period of decomposition, and recoating is therefore necessary. In the ordinary course of affairs, if no accident occurs, it will be found that the growth on the vessel's bottom in about six months is so great as to impede considerably her speed, or seriously increase her coal consumption to keep up her speed. It is therefore necessary before the application of the new coating to clean the ship's outer skin by scraping, and then apply without any delay the composition. Of course if, in addition to submarine damage, damage has been done above the water-line to parts of the vessel which are painted with ordinary oil paint, this paint will be re-

newed as part of the damage repairs, and it is not the latter kind of painting that is referred to in the Rule of Practice of the Average Adjusters' Association, which runs as follows :

51. SCRAPING AND PAINTING

When in consequence of damage by a peril insured against, the ship's bottom has to be scraped and painted, the cost of such painting and scraping shall be charged to the underwriters on ship, without any deduction on account of the vessel having become due for ordinary painting at any time subsequent to the accident.

Closely connected with this question of thirds new for old is the allowance that is made in cases of substitution of new material for old. When damage is repaired by replacing new materials for old the value of the old is credited to the underwriter. This credit is in England entered *after* the deduction of the third from the cost of the new ; in America *before* the deduction. The difference to the underwriter is consequently one-third of the value of the old materials. There are other deductions resting upon custom which are universally respected, although there is no mention of them in the policy or other document of insurance. For example :

- (1) *Sails lost.*—Sails split by the wind or blown away while set are not charged to underwriters unless the loss be occasioned by the ship's grounding, or coming into collision, or in consequence of damage to the spars to which the sails are bent.
- (2) *Rigging chafed.*—Rigging injured by straining or chafing is not charged to underwriters unless such injury be caused by blows of the sea, grounding, or contact, or by displacement through sea peril of the spars, channels, bulwarks or rails.
- (3) *Gear, etc., on Deck.*—Damage or loss of water-casks or tanks carried on a ship's deck is not paid for by underwriters, nor is that of warps or other articles when improperly carried on deck.

These three provisions form part of the old custom of Lloyd's, by which term is now generally understood the customs of English adjusting, whether affecting General or Particular Average and not determined by a decision of the

superior Courts, for whatever is so determined rests on a ground surer than mere custom. If these three customs are analysed it will be found that they rest upon three principles :

- (a) The underwriter has not to pay for wear and tear.
- (b) The underwriter has not to pay for loss occurring to anything insured in the course of its ordinary and proper use in the work for which it was intended.
- (c) The underwriter has not to pay for damage to insured property arising in consequence of its being in a position on the ship which it was not intended to occupy.

The first and the last of these principles find an application in cargo claims as well as in ship claims. Ordinary loss in weight in the course of a voyage approximates very closely to *vice propre*, inherent quality and wear and tear of cargo, and the refusal to admit damage on items of the ship's equipment carried in improper places recalls the provision that the ordinary insurance contract on cargo does not cover cargo except under deck, so that cargo in deck-houses is not covered unless by special arrangement, and is as regards the contract of affreightment and all matters of General Average absolutely and totally distinct from the rest of the cargo (*Royal Exchange Shipping Co. v. Dixon, Egyptian Monarch*, 1886, 12 App. Cs. 11).

The customary deduction for thirds new for old and the refusal to admit as a claim on the policy such diminution and/or deterioration as can fairly be attributed to wear and tear without the intervention of sea peril, are practically two instances of the application of the one principle. But it was not until the introduction of the compound engine as the ordinary motor in steamships that the matter assumed a shape serious for both shipowners and underwriters. Crank shafts, thrust shafts, and tail-end shafts have a way of snapping "mysteriously," that is without the obvious occurrence of such severe weather as might lead an engineer to expect such an accident, and also without the contact of the propeller or the body of the ship with any rock, bank, or floating wreckage. It had occurred to

several experts engaged in the examination of claims that the reported or suggested contact or collision said to have caused a breakage in the shaft, or in the piston rod or connecting rod, was in itself insufficient to produce the effect attributed to it, unless it were regarded as merely the last of a series of untraced, probably untraceable, shocks that had been inflicted on the part in question, which was thus all the time gradually but steadily deteriorating, until at last a very slight strain brought about the final smash. There have even been cases where no external pressure or stroke could be indicated, so that one had almost a right to say that the part in question had always been latently defective, probably in consequence of the irregular cooling of the metal when it was being forged or cast. A series of unsatisfactory cases brought owners and underwriters alike to the conclusion that it was desirable to have settled by a House of Lords decision a simple case in which the facts admitted of no manner of doubt. The *Inchmarnie* case went to the House of Lords in 1887. Although in that case the damage proceeded entirely from the negligence of those in charge in not seeing that the valve of the aperture leading into one of the boilers was open, still the judgment embraced not only negligence but also every other incident that is not a peril of the seas or a peril *ejusdem generis*. The judgment was so completely in favour of underwriters, who had denied their liability for the accident in this case, that it was felt that steamship owners must have some protection against the serious losses they might meet in parallel circumstances, so that the practical outcome of the case was the invention of a special clause of such a tenor as to get round the House of Lords judgment given on an ordinary policy. The form in which that clause is now used reads as follows :

This insurance also specially to cover (subject to the free-of-average warranty) loss of or damage to hull and machinery through the negligence of the master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided that such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them or by the manager.

As regards latent defect it was decided in the case of the *Zealandia*, 1907 (Appeal Court, 23 Times L.R. 673), that there must be evidence to show that the loss from the latent defect occurred during the currency of the policy sued upon. Latent defect dating from the building of the ship was dealt with in the case of the *Ellaline*, 1911 (K.B.D. 27 Times L.R. 217).

Concurrent Repairs.—It frequently happens that repairs or refit on owner's account are carried on at the same time and by the same workmen who are engaged on repairs resulting from sea peril for which underwriters are liable. There is usually no difficulty in separating the items of account both for material and for labour, so that each party finally pays that part of the total expense incurred in connection with the items for which he is liable. But there are certain charges such as dock hire which are incurred only once, in consequence of the repairs being effected concurrently, but which would have had to be incurred twice had the owner's refit and the underwriter's repairs been done at separate times and places.

In the case of the *Vancouver*, 1886 (11 App. Cs. 573), two sets of repairs, shipowners' and underwriters', quite distinct but both necessary, were going on in graving dock at the same time. Three days' dock dues were saved by the concurrent execution of the repairs—the shipowners' work alone would have occupied three days, and the underwriters' alone eight days. The House of Lords confirmed the decision of the Court of Appeal that the first three days' dues should be halved between the shipowners and the underwriters, and the remaining five should fall entirely on the underwriters. In the case of the *Ruabon*, 1900 (App. Cs. 6), the vessel, having grounded in the course of a voyage, was in January 1896 put into dry dock to effect the average repairs, for which her underwriters were admittedly liable. In November 1896 she would have been due for docking and survey to retain her class at Lloyd's. The owners took advantage of the January docking and had her surveyed whilst in dock for the repairs. It was claimed that in such a case part of the docking expenses should be borne by the owners. It was finally decided

that the whole expense was chargeable to the underwriters. This decision was reached after discussion of a principle stated by Lord Halsbury as follows :

“ This is the first time in which it has been sought to advance the principle of contribution where there is nothing in common between the two persons except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise on some general principle of justice, that a man ought not to get an advantage unless he pays for it. So that if a man were to cut down wood which obscured his neighbour's prospect and gave him a better view, he ought, upon this principle, to be compelled to contribute to cutting down the wood. Or, if a man build a wall so as to shield his neighbour's house from undue wet or danger from violent tempest, he ought to be entitled to contribution because his neighbour has got an advantage from what he did.”

Lord Halsbury totally dissented from this principle and the result of his decision is that when concurrent repairs are effected the dry dock dues are charged entirely to the underwriters on ship, unless the repairs on owner's account were of urgent necessity, and their absence affected the seaworthiness of the vessel.¹

In the foregoing paragraphs have been discussed the provisions of the law and the customs of adjustment in cases in which after a casualty the ship has been repaired, but in Sub-sections 2 and 3 the treatment of unrepaired damage comes up for consideration.

(2) *Partial Repairs.*—It occasionally happens that in-

¹ This is expressed in Rule of Practice No. 52 of the Average Adjusters' Association, viz.:

“ *Dry Dock Expenses.*—That where repairs on owner's account, which are immediately necessary to make the vessel seaworthy, and which can only be effected in dry dock, are executed concurrently with other repairs for the cost of which underwriters are liable, and which also can only be effected in dry dock, the cost of entering and leaving the dry dock, in addition to so much of the dock dues as is common to both repairs, shall be divided equally between the shipowner and the underwriters.”

stead of insisting upon repairs being carried out completely in the way which would make the vessel as good as she was to sail or to sell before the occurrence of the accident giving rise to the damage, an owner is willing to accept repair of a less complete and less perfect character. For instance, instead of insisting on having new beams or frames, he is content to have the injured beams or frames scarphed, that is to say cut at the worst point of the damage and joined with new plates and rivets to the rest of the original frame. Obviously this repair is less desirable than the insertion of a beam or frame, and this is brought to the owner's notice when he tries to sell the vessel. Consequently, where a vessel is left in this way imperfectly repaired, there is usually a depreciation in the value of the ship, and it is the reasonable allowance for such depreciation in addition to the cost of the completed repairs that is secured to the assured by this sub-section. But the aggregate amount recovered cannot exceed the cost of repairing the whole damage computed as in Sub-section 1.

(3) *Damage unrepaired.*—If no steps are taken during the currency of a vessel's policy either to sell the ship or to repair her, the only method of ascertaining the assured's loss consists of survey and estimate. The Act provides that in this case the assured is entitled to be indemnified for the reasonable depreciation arising from the said damage but not exceeding the reasonable cost of repairing such damage less the customary deductions, computed as explained in Sub-section 1. But suppose the ship had been during the currency of her policy sold with her damage unrepaired, what is the position of the assured? The Act does not provide for this eventuality. M'Arthur, p. 220, states on the authority of *Pitman v. Universal Marine*, 1882 (9 Q.B.D. 192), that the claim under the policy will be for the estimated cost of the repairs, less the usual deductions, provided that the amount so stated is not in excess of the actual depreciation in the value of the vessel as ascertained by the sale. Thus the assured by so selling fixes the maximum loss as against himself. It is worth noting that a clause to this effect stood as Sub-section 4 of this section of the Bill from 1896 to 1902, but disappeared

from March 1903 after an expression from the draftsman of the Bill that the omission of the clause would give effect to Lord Esher's judgment in Pitman's case against the Universal Marine.

Removal for Repairs.—In all the foregoing discussion on the subject of repairs and their cost, it is assumed that the damaged vessel is at a port where repair can be effected. But it is possible that the nearest port to the scene of disaster may be one at which no repair can be effected, or no repair that would pass as satisfactory permanent repair, but only such as might be accepted as merely temporary and provisional until the vessel arrived at a proper repairing place. On the supposition then that permanent repairs cannot be effected at the port where the vessel is the owner has to make his election between

- (a) Removal for Repairs, and
- (b) Temporary Repairs.

(a) *Removal for Repairs.*—In order to fulfil the requirements of Section 69 of the Act, it is necessary to find out how much of the cost of removal can fairly be included under the words "reasonable cost of repairs less the customary deductions." The Average Adjusters' Association proposed and accepted in 1896, and confirmed in 1897, the following Rule of Practice bearing on the subject :

47. EXPENSES OF REMOVING A VESSEL FOR REPAIR

Where a vessel is in need of repair at any port and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected or cannot be effected prudently :

- (a) The necessary expenses incurred in removing the vessel to the port of repair shall be allowed as part of the cost of repair, and where the vessel after repairing forthwith returns to the port from which she was removed, the necessary expenses incurred in returning shall also be allowed.
- (b) Where by moving the vessel to the port of repair any new freight is earned or any expenses are saved in relation to the current voyage of the vessel, such net earnings or savings shall be deducted from the expenses of moving

her, and where the vessel loads a new cargo at the port of repair, no expenses subsequent to the completion of repair shall be allowed.

The expenses of removal include the cost of temporary repair, ballasting, wages and provisions of crew, and/or runners, pilotage, towage, extra marine insurance, port charges, and in case of a steamer, coal and engine-room stores.

(c) This rule shall not admit any ordinary expenses incurred in fulfilment of a contract of affreightment, though such expenses are increased by the removal to a port of repair.

(b) *Temporary Repairs at Port of Refuge.*—But if the port nearest to the scene of disaster cannot provide permanent repairs or can only provide them at a very excessive cost or with unreasonable delay, and the ship is consequently removed under temporary repairs to a final repairing port, how is the cost of the temporary repairs to be apportioned? It seems that one ought to draw a distinction between the case of final repairs being executed at a port of destination or at some port which the vessel reaches after her destination and that of final repairs being done at a port between the first port of refuge and destination. But this distinction does not affect the incidence of the temporary repairs. Phillips, in Section 1300, states that temporary repairs of damage from extraordinary perils of the seas made at some intermediate port for the purpose of prosecuting the voyage where thorough repairs could not be made without unreasonable delay or material inconvenience and prejudice to all concerned, are general average in so far as such temporary repairs are of no peculiar benefit to the shipowner, and leave him subject to the same expense in prosecuting the voyage and subsequently making repairs as if the temporary repairs had not been made. He goes on to say that this ground of claim for contribution is to be strictly limited, as it is the duty of the shipowner in general to furnish a seaworthy ship, and so far as practicable to keep it in condition fit for prosecuting the voyage, the exception to the rule not depending upon what is for the shipowner's interest solely, but upon what is beneficial to all concerned. Subject to such conditions, he says, temporary repairs belong to general average. He quotes the English case of *Plummer v.*

Wildman, 1815, in which Lord Ellenborough gave judgment to this effect: but added that if the ship by such expenditure gained a lasting benefit there must be a deduction of so much, which must be placed wholly to the shipowner's account. But, as is pointed out in Arnould, 8th ed., Section 948, the decision may well be explained on the ground that the repairs were rendered necessary by a sacrifice of part of the ship for general safety. The case, in fact, is a good illustration of the difference of view between England and America of what constitutes General Average: to Phillips the fact that the sacrifice was beneficial to all concerned in enabling them to prosecute the voyage justifies the claiming of all concerned for a contribution of general average, while to Lord Ellenborough the admission of the sacrifice as General Average is justified by the fact that it was one made for the general safety. In result they agree in this particular case, but Lord Ellenborough never would have concurred in Phillips' view, that temporary repairs of damage *from extraordinary perils of the seas* made at some intermediate port for the purpose of prosecuting the voyage . . . could have constituted general average, or did so constitute it. On principle it appears evident that the charge for temporary repairs should not be treated as general average unless the damage so repaired is the immediate result of an intentional sacrifice for common safety.

There is the further point, in how far temporary repairs should fall entirely on the underwriter on the ship. If the cause of effecting them is that permanent repair cannot be effected at all or cannot be effected at reasonable cost at an intermediate port, then, undoubtedly, the underwriter is interested in getting temporary repairs effected just as much as the owner. But should the cause of the adoption of temporary repairs at an intermediate port be merely the saving of time, then it is submitted that the criterion to be adopted is that already proposed above in connection with overtime. In other words, the cost of the temporary repair ought to be apportioned between the interests and parties concerned (whether shipowner with ship underwriter alone, or shipowner with underwriters on ship and freight, or shipowner with underwriters on ship and freight, besides

cargo-owner and cargo underwriter) in proportion to their several interests. It may be suggested that this might be a somewhat complicated arrangement. In practice it would probably work out much more simply than it looks when stated as above in the widest possible terms.

From consideration of partial loss on ship the Act proceeds to deal with the case of partial loss on freight :

§ 70. Subject to any express provision in the policy, where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

The meaning of the section is fairly obvious, but the wording is hardly so happy as it might have been. It is submitted that the following form embodies what is meant by the clause, and is perhaps a little simpler :

Subject to any express provision in the policy where there is a partial loss of freight, the measure of indemnity is that proportion of the valuation of freight in the policy (in the case of a valued policy) or of the insurable value of the freight (in the case of an unvalued policy) which the amount of freight lost by the assured bears to the whole amount of the freight at the risk of the assured.

The intent of the clause is simply that the underwriter shall pay an amount representing the same proportion of the insured value or the insurable value, according as the policy is valued or unvalued, which the owner's loss of freight bears to the total amount of freight he had at risk. This regulation seems so evidently equitable and just that it is difficult to see in what other way a partial loss on freight could be defined or enforced. The true difficulties of the clause, however, do not at all rest in the arithmetical or quasi-arithmetical part of it, but lie in the apparently harmless and simple words at the commencement of the section, viz. "subject to any express provision in the policy," and "where there is a partial loss of freight." There is the further difficulty arising out of the prepayment or advance of the whole or part of the freight, and out of the nature of chartered freight.

The policy form given in Schedule 2 of the Act contains no mention of freight except in the so-called memorandum, in the last clause of which it is stated the ship and freight are warranted free from average under three pounds per cent, unless general, or the ship be stranded. But that simple provision does not suffice to meet the wants of modern insurance. Freight policies nowadays are found to contain very wide-reaching descriptions of the insured interest, stating it to be "freight chartered or as if chartered, on board or not on board," to which are sometimes added the words, "full interest admitted," the policies thus becoming wager policies, mere honour documents, and not available as evidence of contract in any court of Great Britain. Similarly, modern policies on freight usually contain a clause known as a *detention clause* in something of the following form :

Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

This clause was originally inserted in the policy after the decision in *Jackson v. The Union Marine*, 1873, so as to embody in the words of the contract the decision of the courts that had in that case been given in the underwriter's favour, to the effect that when the subject insured is an expectation of gain (say freight), and the loss of the opportunity to earn it arises from the charterer's option to cancel the contract, then although this option only comes into operation through the action of a peril of the sea, the loss is not a loss falling upon the policy. Similarly, when freight is insured upon time and the terms of the charter are such that each month's freight is paid at the end of that month, then the amount of freight at the risk of the shipowner obviously diminishes by the amount of cash received by him every month. To meet cases of this kind a clause has been devised of the following form :

Diminishing Clause.—It is agreed that the amount at risk shall be reduced by one-twelfth for each expired month.

Obviously a suitable clause can similarly be arranged to meet the case of freight accruing daily, weekly, quarterly,

or half-yearly. It is very difficult to give instances which will illustrate solely "the express provision in the freight policy," without at the same time considering what are the circumstances in which "there is a partial loss of freight." In dealing with the insurance problems connected with freight one soon learns that the only safe solutions are those which fully recognise that much, if not all, depends upon the tenor of the contract of affreightment. For instance, if an insurance is effected on freight at risk on a voyage between the United Kingdom and Calcutta, and owing to a peril of the sea covered by the policy half of the cargo is lost, then it would appear obvious that the shipowner is entitled to receive from the underwriter 50 per cent of the amount he had insured on freight. But if on examination it turned out that in accordance with the contract of affreightment the shipowner received on account of the entire freight one half on the loading of the cargo, the other half being due on delivery at destination, the result would be that in the supposed case the amount advanced by the charterer covered all his liability for freight of the half cargo delivered, while the shipowner received nothing more than the advance, and could consequently claim a total loss on his freight at risk. On the other hand, had the advance been made not on account of the entire freight but as one half of the freight of each ton or other unit of cargo, then after the occurrence of the same disaster the charterer would have had to pay on delivery the remaining half freight of each unit of the delivered portion, and the shipowner would have had a loss of half his freight at risk, while the underwriter on the charterer's advance freight would have had to pay as a loss the advance freight on the undelivered part of the cargo. This is practically what happened in the case of *Allison v. The Bristol Marine Insurance Co.*, 1875-76. This principle applies in all cases in which there is a pre-payment made per unit of cargo loaded or delivered. But the cases of lump sum freights stand on a different basis, as there are instances in which the carrier is not entitled to any freight unless the whole cargo shipped is delivered, and, on the other hand, instances in which the shipowner is entitled to the whole freight, however small the proportion

of the cargo he may succeed in delivering at destination. It is obvious that unless the terms of the freight contract in such exceptional cases were brought to the full knowledge of the underwriter covering chartered freight in the former case and freight at risk in the latter, there would be good cause for alleging concealment as a ground for voiding the policy.

The law of England being to the effect that the contract of affreightment is not fulfilled by any delivery of goods at a point short of destination, it naturally follows that the English law of insurance is bound to take into consideration cases of forwarding expenses which do not come into play in the law of the countries which recognise distance freight. In case of the condemnation of a British ship in the course of a voyage it is open to the shipowner to make arrangements for the forwarding of the cargo to destination. If he can do this on such terms as will leave him a profit on the transaction (that is, if he can forward and deliver the cargo at destination for a freight less than his bill of lading freight), he is entitled to do so and to charge freight as per original bill of lading. But if the forwarding charge exceeds the bill of lading freight the forwarding charge is payable in full by the consignee of the cargo on delivery, and the original shipowner loses his bill of lading freight. A similar rule obtains in the case of lump sum charters. M'Arthur (at p. 239) sums up well the whole position in the words, "The freight at the risk of the shipowner must be exhausted before the freight at the risk of the charterer can be effected by the cost of forwarding."

There is another set of problems that has arisen in connection with freight policies. It has frequently happened, particularly in the cotton carrying trade, that a vessel is left at her loading port partly empty owing to perils insured against (e.g. fire) destroying cargo loaded on board of her. The loss would appear to be a partial loss of freight from perils insured against. What would happen if she were to complete the voyage for which she had loaded the cargo and tendered at her destination adequate proof that the missing cargo was destroyed by a peril insured against? Such a course would only be adopted in consequence of the

freight being insured, as in any other case the shipowner would certainly do his best to obtain new cargo to fill up the place of that which has been destroyed. If he does effect a new charter or make a contract for refilling the burnt-out part of his ship, what would his position be with regard to the second freight? If the whole of it remains his property the net result of the accident, as far as the hire of the ship goes, is to earn considerably more than one freight in the course of one half voyage. That hardly seems fair to the underwriter who has paid a partial loss on the first freight, for it is practically in consequence of the accident that happened to his interest that the ship was put in this favourable position. Is the underwriter not entitled to have some share of the second freight as a kind of salvage of the interest on which he had paid loss? A suggestion has been made that if the destruction of part of the cargo took place at the original port of shipment the substituted freight should be regarded as being incorporated with the original freight, but this suggestion seems to leave out of consideration the fact that the shipowner has undoubtedly a legal claim for partial loss against the freight underwriter, so that all the latter can fairly expect is some allowance out of the new freight towards the reduction of his loss. It was on those lines that the Cotton Conference documents were drawn after the occurrence of several fires at Savannah, 1886-87.

Before leaving the consideration of Section 70, dealing with partial loss on freight, it is well to remark the provisions of this section deal with freight in the widest sense which can be given to that word. As defined, not only in Section 90 of the Act, but also in the Rules for the Construction of the Policy in the first Schedule, Rule 16, "The term 'freight' includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money." The wording of this extension of the idea freight leads to the consideration of partial loss of the third great maritime interest, cargo, which the Act proceeds to deal with in the following words :

§ 71. Where there is a partial loss of goods, merchandise, or other moveables, the measure of indemnity, subject to any express provision in the policy, is as follows :—

We have in Schedule 1, Section 17, the following definition of goods :

Section 17. The term "goods" means goods in the nature of merchandise, and does not include personal effects or provisions and stores for use on board.

In the absence of any usage to the contrary, deck cargo and living animals must be insured specifically, and not under the general denomination of goods.

In Section 90 of the Act we have the following definition of moveables :

"Moveables" means any moveable tangible property other than the ship, and includes money, valuable securities, and other documents.

Merchandise does not appear in the supplemental sections of the policy or in the schedules, except in the definition of the word "goods," we are therefore entitled to take it in its widest meaning, the wares or commodities of a merchant.

In this Section 71 we are again confronted with the clause, "Subject to any express provision in the policy," which in the case of cargo is a much more important provision than in hull or freight. For in cargo there is an infinitely greater variety of substance, character, and quality of the articles insured than there is in ship or freight, and the art of the cargo underwriter has largely consisted in discovering or anticipating the comparative amounts of damage that will be shown in different goods exposed to the same circumstances of weather, changes of climate, and the other vicissitudes to which they are exposed on a sea voyage. This divergence of experience and expectation is shown by the vast multitude of clauses which have been from time to time devised by and for underwriters, expressing the conditions without which they are unwilling to issue their policy for insurance of goods of various material, nature, and consequent susceptibility to damage. The importance of the last point will come out when we come to consider damaged cargo at Sub-section 3 below. Mean-

while it may be stated that the most complete collection of clauses to be found in English is that issued by Mr. Douglas Owen, *Marine Insurance Notes and Clauses*, 1890.

In the specimen policy given in Schedule I the clause known as the Memorandum, and so marked in the margin, reads as follows :

N.B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent, and all other goods, also the ship and freight are warranted free from average under three pounds per cent, unless general, or the ship be stranded.

It is unfortunate that the wording of this clause is not so absolutely accurate as to make doubt impossible. The second portion of the memorandum would have had its effect rendered much clearer had there been added explicitly after the words five pounds per cent the following : “unless general, or the ship be stranded.” It may be urged that the occurrence of these words at the very end of the memorandum is meant to cover the whole clause from the word sugar . . . to the end, but it is better to repeat the phrase rather than run any risk of misunderstanding. This memorandum first appeared in English policies in the year 1749. Writing in 1808, Benecke (vol. iii. pp. 78, 79) stated that the original intention of the memorandum (as of clauses of the same class in the policies of Hamburg, Holland, and Bordeaux) was unmistakably twofold: (a) To free the underwriter from the damage which would occur even on not specially unfortunate voyages through trivial mishaps, more to be attributed to the faulty condition of the vessel than to any special sea peril, but more unfavourable in its effects on goods of the specified genus than of others; (b) to prevent the underwriter being burdened by the *vice propre* (inherent nature) of the goods, especially when external damage has also occurred and cannot be distinguished from the aforesaid internal damage. The idea was by these regulations to put the more damageable goods on the same footing as the more endurable, so that the risk of the underwriter on the one class would not be greater than on the other, and that the premiums might be fixed without

regard to the species of the goods. But Benecke adds that this is a task which can only be approximately solved in the way indicated, for it is impossible to determine in every single case what part of the damage is to be attributed to the quality of the goods, and to leave the underwriter to replace only so much as he would under similar circumstances have replaced on more durable goods. Stevens, in his *Essay on Average*, states that the warranty making certain articles free of average under a named percentage is of a later date than the wider clause “free of all average.” From this it appears that before the adoption of the memorandum in every policy, the component parts of it must have been made use of separately as required by underwriters. This gives a good explanation of the faulty form of the memorandum, for down to this day it is found that no clause is so difficult to get into proper shape as one constructed of materials already in separate use.

The words in the memorandum, “Average unless general,” are interpreted in Schedule 1 as follows :

13. The term “average unless general” means a partial loss of the subject-matter insured other than a general average loss, and does not include particular charges.

The necessity for this definition arose from the fact that it was on one occasion contended that these words embodied the provision that if a general average loss took place then the underwriters were liable for partial loss also (*Wilson v. Smith*, 1764). But it was held by Lord Mansfield that in this connection the word *unless* means *except*, so that it is not to be construed as denoting a condition. That is to say, the clause means that except general average no loss resulting from sea damage and less than a total loss shall be paid: it does NOT mean that no loss resulting from sea damage and less than a total loss shall be paid unless general average occur, in which case partial loss resulting from sea damage shall be paid. As regards the last phrase in Clause No. 13 quoted above, it is derived from the judgment of Lord Justice Fry (in *Price v. A1 Ships Small Damage Association*, 1889), in which he decided that “free of average unless general” is equivalent to “free of particular average.”

One result of this decision was to reaffirm the jury's finding in the case of *Kidston v. The Empire Marine Insurance Co.*, 1866-67 (L.R. 1 C.P. 535, 2 C.P. 357), that expenses incurred in an intermediate port for the reconditioning, preservation, or recovery of the property insured, known as "particular charges," are in their nature entirely distinct from particular average, which denotes merely the loss arising from actual physical damage, that is, diminution and/or deterioration.

The closing words of the memorandum, "Or the ship be stranded," form the subject of a special rule in Schedule 1, viz. :

14. Where the ship has stranded, the insurer is liable for the excepted losses, although the loss is not attributable to the stranding, provided that when the stranding takes place the risk has attached, and if the policy be on goods the damaged goods are on board.

The reason for the existence of this explanatory clause lies in the fact that cases of uncertainty as to liability have actually occurred, and have been submitted to the decisions of the courts. As early as 1754, that is only five years after the memorandum was invented, Sir Dudley Ryder held (in *Cantillon v. The London Assurance*) that a stranding entitles the assured to claim the whole loss occurring on the voyage. In consequence the London Assurance and the Royal Exchange Assurance struck the words "or the ship be stranded" out of their policies. In later cases the Courts wavered, but it was finally settled by Lord Kenyon (in *Burnett v. Kensington*, 1797), that "if the ship be stranded and the cargo suffer no damage whatever, and afterwards the vessel meet with bad weather and the cargo sustain an average loss of say ninety per cent, the underwriters are answerable for the whole of that average loss."

To appreciate fully the meaning of the words of the memorandum it is necessary to consider the exact effect of the words, "or the ship be stranded." There is no definition of stranding given in the Act, probably because the definition would necessarily be one of a matter of fact and not of a principle of law, but there are numerous cases in the course of which judges have made statements of what they con-

sidered constituted a strand and what did not. Lord Ellenborough (in *McDougle v. Royal Exchange*, 1816) says :

“ If it is touch and go with the ship there is no stranding. It cannot be enough that the ship lay for a few minutes on her beam ends. Every striking must necessarily produce a retardation of the ship’s motion. If by the force of the elements she has run aground and become stationary, it is immaterial whether this be on piles or on rocks or on the sea shore, but a mere striking will not do wheresoever that may happen.”

Later on in the same judgment he said :

“ I take it that stranding in its fair legal sense implies a settling of the ship, some arresting or interruption of the voyage, so that the ship *pro tempore* may be considered as wrecked.”

The same judge said in *Baker v. Towry*, 1816 :

“ It is not merely touching the ground that constitutes stranding. If the ship touches and runs that circumstance is not to be regarded : but if she is forced ashore, or driven on a bank and remains for any time on the ground, this is stranding without reference to the degree of damage she may thereby sustain.”

Lord Tenterden in *Wells v. Hopwood*, 1832, said :

“ Where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of tide or increase of water, such an event shall not be considered as stranding within the sense of the memorandum, but where the ground is taken under any extraordinary circumstances of time or place by reason of some unusual or accidental occurrence, such an event shall be considered as stranding within the meaning of the memorandum.”

In *Kingsford v. Marshall*, 1832, Chief Justice Tindal used the following words :

“ Where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which

the ship is engaged, either wholly or in part, but from some accidental or extraneous cause, that is a stranding."

The final clause in Rule of Construction No. 14, quoted above, provides that cargo loaded on board a vessel after she has stranded and suffering sea damage on the course of the voyage, shall not be regarded as if it had been on board the vessel at the time the stranding occurred, in other words, sea damage occurring to that cargo shall not be recoverable as if the warranty in the memorandum had been broken. This provision becomes important in such trades as that of the River Plate, where the loading of the cargo is often completed after the vessel has been ashore in the river and estuary above Buenos Ayres.

Having thus discussed the conditions of the schedule form of policy as regards claims for partial loss on cargo, we return to the first sub-section of Section 71.

§ 71. (1) Where part of the goods, merchandise, or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

In this sub-section the Act embodies the decision of Lord Mansfield in *Lewis v. Rucker*, 1761. He had to decide in that case the proper amount to be paid by an underwriter in connection with a partial loss of goods. And concluding that the extent of the underwriter's liability must be determined in accordance with the amount insured on the policy, he laid it down that the amount payable by an underwriter for partial loss is the same proportion of the insured value of the whole shipment which the invoice cost plus expense of loading of the items lost bears to the invoice cost plus expense of loading of the whole shipment insured. The underwriter's liability is thus fixed without involving any consideration of freight payable at destination or profit or loss of the venture resulting from fluctuations of the market. The principles accepted by Lord Mansfield in this judgment have remained the principles of English adjustment down to this day.

§ 71. (2) Where part of the goods, merchandise, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in case of total loss.

The object of this sub-section is simply to extend to unvalued policies the principle that has been stated in the preceding clause as applicable to valued policies.

The last words of the sub-section refer us back to Section 68, Sub-section 2, which in turn leads us back to Section 16, Sub-section 3. It is difficult to see any necessity for the words "in case of total loss" in this clause, as the principle on which the value is settled is quite irrespective of the fate of the venture, and the words therefore seem to be superfluous.

§ 71. (3) Where the whole or any part of the goods or merchandise insured has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy, in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value.

With this sub-section the Act proceeds from the consideration of such partial losses as consist in the diminution of the quantity of the subject insured to that of such as arise from deterioration or damage sustained by the subject insured. The principle is laid down that in respect of such losses the underwriter shall be liable for the same proportion of the insured value of the goods in question where the policy is a valued policy, or of their insurable value where the policy is unvalued, as the difference between the gross sound and gross damaged values at the place of arrival bears to the gross sound arrived value.

In order to prevent any mistake or confusion regarding what is meant by gross sound and gross damaged values in Sub-section 3, the Act proceeds to define what is meant by "gross value" and "gross proceeds" (although the latter phrase does not occur in Sub-section 3) :

§ 71. (4) "Gross value" means the wholesale price, or if there be no such price, the estimated value, with, in either case, freight,

landing charges, and duty paid beforehand ; provided that, in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value.

“ Gross proceeds ” means the actual price obtained at a sale where all charges on sale are paid by the seller.

The point determined in Sub-sections 3 and 4 is one which was assumed by Lord Mansfield in his judgment in *Lewis v. Rucker*, 1761, viz. that there could be no doubt about the amounts described in the judgment by the words “ sound arrived value ” and “ damaged arrived value,” but this very question rose in the case of *Johnson v. Sheldon*, 1802, long known as the “ Brimstone Case.” The policy covered a shipment of brimstone and shumac from Sicily to Hamburg. The amount of the loss was calculated by an experienced claims stater, who applied the rule laid down in *Lewis v. Rucker*, taking for his basis the difference between the net proceeds of the damaged goods and their net sound value. The matter came before Mr. Justice Lawrence in the Court of King’s Bench, who gave what Arnould describes as “ one of the ablest judgments ever delivered in Westminster Hall.” He found that the true rule of adjustment is that “ the percentage or aliquot part which the underwriter has to pay of the prime cost or value in the policy, must be ascertained by comparing the gross produce of the sound with the gross produce of the damaged sales,” meaning by gross produce the price including freight, duty and landing charges. His reason for adopting this price was that he desired to get at the intrinsic values of the goods in their sound and damaged conditions at destination. This intrinsic value is obviously the price which the buyer will give for the goods at destination when he has nothing but the selling price to pay in order to effect the transfer of the property from the seller to himself. He has nothing to do with the cost of production or delivery in his market, but solely with its value when it has arrived there. Consequently, if a sound article will go twice as far or will last twice as long, or in some other way be twice as useful as the same article damaged, he will be ready to pay twice as much for the sound as for the damaged.

Mansfield and Lawrence’s judgments, cited above, have

remained the law for the adjustment of Particular Average. It has been pointed out that there are cases to which they do not apply, for instance, the loss of a part of a machine, the absence of which renders the whole machine useless for the purpose for which it was shipped: but this somewhat singular case has in practice been specially provided for by the use of what is called the "Machinery Clause":

Machinery with Average.—In case of loss or injury to any part of a machine consisting, when complete for sale or use, of several parts, this policy shall only be liable for the insured value of the part lost or damaged.

Small Machinery F.P.A. (Sewing Machines, Typewriters, Motor Engines, etc.).—In the event of breach of the F.P.A. warranty and a claim for loss or injury to machinery, underwriters to be liable only for the cost of repairing or replacing the parts lost or injured, including all charges incidental thereto.

But with the exception of interests as are properly insurable with such special clauses, it may be said that the rules of adjustment discussed above are justly applicable to all classes of ordinary merchandise for which there is a current market at the place of destination. The reason for making this reservation lies in the fact that the smaller the market is for any commodity the greater the fluctuations in the sound price that will be offered for it. It is clear that if there is only demand for fifty tons of some particular class of goods at one destination the market will be flooded if the supply rises to seventy-five tons. This being true for the sound values it is very much truer for the damaged values. As a matter of fact, damaged goods *never* have a market value in the same sense that sound goods have, so that the underwriter can never be quite independent of considerations of the market where damage is concerned.

But there are two points that demand special consideration. The customs arrangements of most civilised countries provide that dutiable goods may be stored under customs control at the port of arrival without incurring the payment of customs duties until a buyer has been found for them who can remove the goods out of the jurisdiction of the customs only on payment of the duties. We thus learn to distinguish a bonded or duty unpaid value as distinguished

from a duty paid value. In cases where the duties are large in comparison with the duty-free price of the goods, it is clear that as the insurance ceases on delivery from the ship at destination the exporting merchant has no cause to include in his insured value duties payable after arrival, and for this reason the custom of Lloyd's has been recognised for many years to compare bonded instead of duty paid prices in claims for damage to tea, tobacco, coffee, wines and spirits, imported into this country. The limitation to those particular articles and to the case of their import into this country having been found in practice to be inequitable, the principle was extended to cover all cases of goods where it is the custom of the port of destination to sell or deal with the goods in bond, in which cases the term "gross proceeds" is for the purpose of adjustment taken to mean the price at which the goods are sold to the consumer after payment of freight and landing charges, but exclusive of customs duty.

The principle underlying this special treatment of customs duty payable after arrival at destination is really applicable to every case in which the freight on goods is payable at destination. The shipper's venture at sea is completed by the arrival of the vessel, after which only the goods become liable for freight. If the venture had been lost at sea the person to suffer in respect of freight payable at destination would have been neither the shipper nor the consignee but the shipowner. Consequently, since particular average on the goods is adjusted on a sound value, which includes freight and landing charges, the shipper if he covers only prime cost and shipping charges will find himself fully covered in case of total loss but under-covered in case of partial loss just to the extent of the freight and landing charges. Experiences of this kind have often given rise to the feeling that the rules of adjustment were not correct, whereas in reality the fault lay in the shipper under-estimating the amount he had at risk against average. Appreciation of the unpleasant results of this under-insurance led underwriters in France to make, at a comparatively early time, special provision for the insurance of freight payable abroad in connection with the insurance of the shipping value of the goods, the freight

insurance being warranted free of claim in case of total loss of ship. In consideration of this warranty the premium on the freight payable abroad is generally made one-half of the rate charged on the goods. The same practice has been introduced into English insurance under the name of Insurance on Freight Contingency, a clause of the following tenor being used :

Freight Contingency.—On increased value on arrival by payment of freight and/or of charges; being against the risk of depreciation by perils insured against only. Total loss and/or loss of part to be deemed on arrival: but to include the risks of all craft and/or rafts at destination, and the risk of loss of the whole or part after the freight may have become due.

In consequence of the high duties collected on most goods imported into the United States of America, it became of great importance to American merchants to insure themselves against particular average loss arising to the importer through the enhancement of the sound and damaged values of his goods by the payment of United States customs duty. These imports usually reach America in steamers whose freight is prepaid at the port of loading. The merchant thus finds himself in the same position as regards customs duties that the shipper finds himself as regards freight payable at destination. The solution adopted has been the same in both cases, and it is now the custom in America to insure against average only the amount of duties payable on entry into the country. The rate was originally one-half of the goods rate, but has now sunk to one-third.

In the preceding sections of the Act dealing with measure of indemnity, it is tacitly assumed that the property insured under a single valuation is all of one species. But there is nothing in the law to prevent the insurance of different classes of goods under one valuation, provided, of course, that the designation of that valuation is wide enough to embrace everything actually included in the valuation. Such an insured subject as goods or merchandise would clearly cover interests varying so much in nature as raw silk, tea, copper sheets, pig-iron, tallow in barrels, raw cotton in bales, Manchester piece goods, rubber and oil

cake. To provide for the proper adjustment of claims on mixed interests of this kind the Act provides as follows :

§ 72. (1) Where different species of property are insured under a single valuation, the valuation must be apportioned over the different species in proportion to their respective insurable values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole, ascertained in both cases as provided by this Act.

The principle explained and laid down in the first part of this sub-section came into effect in two judgments of Mr. Justice Williams in 1857, *Duff v. MacKenzie* and *Wilkinson v. Hyde*, both cases respecting insurances on effects, free of all average. In the latter case he stated the principle as follows : " As soon as it is ascertained that the goods are of different species it is as if the different species were enumerated." The effect of this principle is that the underwriter on a policy on goods even on the terms Free of All Average (F.A.A.) or against Total Loss Only (T.L.O.) is liable for the loss of the whole of any one species of property insured under the general designation goods or effects. Thus a F.A.A. or T.L.O. policy is practically turned into an Average policy without the underwriter having any warning or any means to protect himself against what is practically an average claim.

Where the prime cost of each separate species of property referred to in § 72 (1) cannot be got, provision for the method of apportioning the loss is made in the following clause :

§ 72. (2) Where a valuation has to be apportioned, and particulars of the prime cost of each separate species, quality, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities, or descriptions of goods.

Having completed the consideration of Partial Losses consisting in the diminution or deterioration of objects insured on such terms that particular average is recoverable from the underwriter, the Act proceeds to deal with such

claims as may arise for other classes of non-total loss as may arise in the course of a voyage or period insured. The most frequent instances of this class of claims are General Average Contribution and Salvage Charges, regarding which it is enacted as follows :

§ 73. (1) Subject to any express provision in the policy, where the assured has paid, or is liable for, any general average contribution, the measure of indemnity is the full amount of such contribution, if the subject-matter liable to contribution is insured for its full contributory value ; but, if subject-matter be not insured for its full contributory value, or if only part of it be insured, the indemnity payable by the insurer must be reduced in proportion to the under insurance, and where there has been a particular average loss which constitutes a deduction from the contributory value, and for which the insurer is liable, that amount must be deducted from the insured value in order to ascertain what the insurer is liable to contribute.

The wording of this section leaves no doubt as to its intention and effect, but it did not assume this form until after a great deal of discussion and experimenting from 1894 to 1902. In 1902 the case of the steamer *Balmoral* (S.S. *Balmoral Co. v. Marten*) was decided by the House of Lords affirming previous decisions of the Court of Appeal and of Bigham J. In that case the steamer was insured for £33,000, which was also her insured valuation in the policies. She incurred general average expenses and had also to pay for salvage services. In the course of the action for salvage award the actual value of the vessel was proved to be £40,000, which sum was likewise taken as her contributory value for general average. The shipowners claimed from the ship's underwriters the whole amount of the ship's contribution to general average, and to the salvage award. But it was held by the House of Lords that the statement in the policies that the vessel's value was £33,000 bound them to this value as far as the underwriters were concerned, who were therefore collectively only liable for 33/40ths of the whole contribution due by the ship for general average and salvage charges. The position of the underwriter is therefore now as follows : If the policy valuation of the object insured exceeds or equals the contributory value, the underwriters on the policies pay their *pro rata* proportion

of the whole contribution for which the subject insured is liable; but if the policy valuation is less than the contributory value, the underwriters on the policies pay only their *pro rata* share of that proportion of the total contribution which the policy valuation bears to the contributory value.

But although this matter has been definitely settled for Britain by statute, it is worthy of notice that there is in the United States a radical divergence of practice between the courses adopted in Boston and New York. That this is no new difference is obvious from the words of Phillips, writing in 1867 (Section 1410):

“ Mr. Justice Sewall¹ said ‘ the insurer is liable in the proportion which the sum insured bears to the actual value ’ at the time in reference to which the apportionment was made. But he was speaking of a case of the contributory value exceeding the value in the policy, for the proposition is not correct where it is less. There is no difference in this respect between a valued and an open policy, for though the whole amount at which the interest is valued in the policy is covered, yet the parties have agreed that between them the value shall be of a certain amount, and accordingly the insurer is not liable to refund a contribution made upon a greater amount. This is not setting aside the valuation but adhering to it. . . . The practice is different in New York, where, under a valued policy in which the whole value as fixed in the policy is insured, the underwriters contribute the whole amount assessed upon the subject in general average, whether it contributes on a value greater or less than that at which it is fixed in the policy, and so proportionally, if one-half, one-quarter, or any other proportion of the value is insured.

“ This is a very material difference in the practice of the two places as to the mode of adjustment. There is nothing in the policy that favours one of these modes of construction in preference to the other, each being equally consistent with the language of the instrument, and the preference of one or the other being merely a

¹ Of Boston, Mass.

matter of construction and the application of the general principles of insurance. The cases seem, however, to be on the side of the adjustment as stated in Boston."

In the forty-five years since Phillips wrote matters have somewhat changed as regards the American cases. In recent years two unsuccessful attempts were made to carry appeals from decisions of the lower Courts and the Circuit Court to the Supreme Court of the United States. The one case originated in New York,¹ the other in California,² the decision of the Circuit Courts being practically the same in both cases, viz. that when any subject is insured for 100 per cent of the valuation of the policy the underwriters are liable for the full contribution to general average due from the object insured, "and so proportionally (to use the words of Phillips) if one-half, one-quarter, or any other proportion of the valuation is insured." The practice, supported by the decision of the Circuit Court in California, will naturally spread over the whole Pacific coast; it has already been found in full operation in the Hawaiian Islands.

The foregoing comments relate to cases in which no deduction is made from the contributory value on account of particular average loss sustained during the voyage and forming the subject of a claim against the underwriter. The Act provides that where a deduction of this character takes place there shall be a corresponding deduction made from the insured value, the remainder being the amount which determines the liability of the underwriter.

The train of reasoning by which this practice of adjustment was arrived at is probably the following: The insured subject has to contribute to general average on the basis of its arrived damaged value plus any amount made good in general average. But the damaged arrived value is the sound arrived value less any diminution and/or deterioration suffered by it. If the article had arrived perfect in quantity and quality the underwriter would have paid the proportion of its contribution which the insured value bears to the sound value; by analogy, therefore, if it arrives damaged or diminished and has to pay a contribution reduced in

¹ *The St. Paul (International Nav. Co. v. Atlantic Ins. Co.)*, 1900.

² *The Germanicus (Maldonado v. British and Foreign M. I. Co.)*, 1910.

consequence by the amount which the diminution or damage would have paid, it is equitable that the underwriter should have an analogous reduction from the amount of the valuation on which he has to pay, which reduction would be the particular average claimable from him on the article insured. Consequently, it would appear that the underwriter cannot claim to reduce his contributing value by the amount of any loss or damage for which he is *not* liable. To take a glaring example: in case of a bulk cargo insured F.P.A., one-third of which is lost by perils not insured against (for instance, salt melted away without the intervention of a stranding, sinking, or burning, or collision with another vessel), the underwriter would not be able to reduce his value for contribution by one-third, and would become liable for the whole general average unless the valuation of his policy did not exceed 66 per cent of the arrived value of the cargo. It appears difficult to justify this anomaly, but may not that merely indicate that there is something wrong with the reasons alleged for the deduction where the damage is particular average for which the underwriter is liable? Even in the instance named there would not actually be any hardship to the underwriter, unless the arrived damaged value considerably exceeded the insured value—a rare and very unlikely occurrence.

§ 73. (2) Where the insurer is liable for salvage charges the extent of his liability must be determined on the like principle.

Having thus disposed of liabilities arising out of sacrifices made on behalf of the whole venture and charges arising out of services rendered either to the whole venture or to individual components of it, the Act proceeds to deal with the determination of the payments due by underwriters in consequence of other liabilities incurred by the parties insured. The policy form in Schedule A gives no particulars respecting any of those liabilities. In fact, protection against liability to third persons is a comparatively recent development in the history of Marine Insurance, originating primarily in Lord Denman's decision in *De Vaux v. Salvador*, 1836, in which he held that a sum ordered to be paid by the owner of one ship to the owner of another for damages

caused by collision is not recoverable as a loss caused by perils of the sea, being "neither a necessary nor a proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations."¹ At a later point we will consider the different classes of liability that have now been accepted by underwriters as part of the risks run on modern policies. Meanwhile the provisions of the Act for the adjustment of such liabilities are as follows :

§ 74. Where the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability.

We now come to certain general provisions as to the Measure of Indemnity :

§ 75. (1) Where there has been a loss in respect of any subject-matter not expressly provided for in the foregoing provisions of this Act, the Measure of Indemnity shall be ascertained, as nearly as may be, in accordance with those provisions, in so far as applicable to the particular case.

(2) Nothing in the provisions of this Act relating to the Measure of Indemnity shall affect the rules relating to double insurance, or prohibit the insurer from disproving interest wholly or in part, or from showing at the time of the loss the whole or any part of the subject-matter insured was not at risk under the policy.

Sub-section 1, being drawn with the intention of including every subject-matter not already definitely dealt with in the sections regarding Measures of Indemnity, is necessarily vague and general in its terms, but it seems to be made unnecessarily indefinite by the admission of the words "as nearly as may be." It is not easy to see what they mean unless it be that the measure of indemnity ascertained in accordance with the provisions aforesaid only imperfectly meets the equitable requirements of the assured from his underwriter in connection with the loss. But there cannot be two measures of indemnity each agreeing with the pro-

¹ In the same year, in the Supreme Court of Massachusetts, Mr. Justice Story held in *Peters v. Warren Insurance Co.* that American law was of exactly the opposite effect. In a later case (*General Mutual Insurance Co. v. Sherwood*, 1852) Mr. Justice Curtis adopted Lord Denman's view, so that now English and American jurisprudence agree on this point. See Phillips, 1137 a.

visions of the Act, and the one approximating more closely to the assured's equitable requirements than the other. Consequently it appears that the words "as nearly as may be" are superfluous. A somewhat similar objection may be made to the final phrase of the sub-section "in so far as applicable to the particular case." How is it to be settled in any case whether the provisions are applicable or inapplicable? The test to be applied is not given by the Act and could hardly be expected from it.

Sub-section 2 adds nothing material to the contents of the Act. It is merely a reminder that the provisions respecting measures of indemnity are not to be read absolutely as if no other considerations were to prevail in the settlement of a partial loss. The two points specially brought to the reader's notice are :

- (a) The effect of double insurance as already determined in Section 32 of the Act.
- (b) The effect of short interest arising from the underwriter disproving interest entirely or partly, or by his showing that the whole or part of the subject-matter was not at risk on the policy when the loss happened.

The sub-section practically amounts to a statement that before a claim can be enforced against an underwriter for partial loss it must be made clear, not only that the adjustment is in accordance with the principles laid down in the Act respecting measure of indemnity, but also that the amount of interest at stake is ascertained as directed by the Act, and that the statutory provisions as to multiple insurance have been fully taken into consideration. This is what every underwriter tries in practice to secure when a claim is made against him.

The Act next proceeds to deal with Particular Average Warranties :

§ 76. (1) Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of part, other than a loss incurred by a general average sacrifice, unless the contract contained in the policy be apportionable ; but, if the contract be apportionable, the assured may recover for a total loss of any apportionable part.

In connection with Section 72, Sub-section 1, we discussed the effect of the apportionment of a valuation over different species of property insured collectively under it. That discussion gave some idea of what is meant to be indicated by the word apportionable. It is suggested by de Hart and Simey (p. 85) that in this sub-section "apportionable" means "severable," but unless "severable" has some distinct technical meaning it would appear to be a rather dangerous word to use in this connection. Suppose the subject-matter of the insurance were a hundred bags of clover seed insured free of particular average absolutely, could it be held that in consequence of the interest consisting of a hundred separable units the contract of insurance is severable or apportionable? That is distinctly not the view entertained by any practising underwriter. In view of an instance like this it is difficult to see how an insurance contract can be apportionable otherwise than through difference of species or of consignee or of commercial transaction as evidenced by invoices and bills of lading. For instance, had the shipment mentioned above consisted not of a hundred bags of clover seed but of fifty bags of clover seed and fifty bags of hay seed, then we apprehend that the loss of the whole of either set of fifty would be claimable as a partial loss on the policy. Similarly, if of the above-named hundred bags of clover seed insured on one policy, all destined to the port X, seventy were shipped on account of A and were consigned to him, and similarly thirty to B; we apprehend that in this case the total loss of either parcel would be claimable as a partial loss on the Free of Particular Average policy. Again, the shipment of a hundred bags of clover seed might consist of one parcel of sixty and one of forty, bought separately by the shipper at Z on account of C, and shipped to C as consignee at the port Y. Suppose those two shipments are insured on one policy F.P.A., would a total loss of either shipment constitute a partial loss on the policy? In other words, is the contract in this case apportionable? The fact of the shipper and consignee of the two parcels being the same, and the fact of the two parcels being homogeneous in character, point rather to the reply being in the negative.

§ 76. (2) Where the subject-matter insured is warranted free from particular average, either wholly or under a certain percentage, the insurer is nevertheless liable for salvage charges, and for particular charges and other expenses properly incurred pursuant to the provisions of the suing and labouring clause in order to avert a loss insured against.

Two matters in this clause immediately claim attention. First is the reference to a "suing and labouring" clause of which no mention has yet occurred in the Act, the earliest reference occurring in Section 78. The second is the closing phrase of the sub-section, "to avert a loss insured against." It is submitted that the full purport of these words would be better expressed by the phrase, "to avert any loss against which the particular policy in question insures"; because it is obvious that this provision expressed regarding an F.P.A. policy in its entirety holds for the total loss portion of the F.P.A. policy, which in this respect entirely differs from a Total Loss Only (T.L.O.) policy, which is against Total Loss and nothing more.

Particular Charges have been defined in Section 64 (2), Salvage Charges in Section 65 (2). As regards the other expenses referred to in this sub-section, they will be treated under Section 78. The whole effect of the present sub-section is merely one of accounting or adjustment.

§ 76. (3) Unless the policy otherwise provides, where the subject-matter insured is warranted free from particular average under a specified percentage, a general average loss cannot be added to a particular average loss to make up the specified percentage.

This sub-section is of very modern origin, and its history is peculiarly interesting. It arose out of a case known as *Price v. A1 Ships Small Damage Assn.*, 1889. In that case the plaintiff insured with the defendant Association the ship *Marlborough Hill* against "all losses which cannot be recovered under an ordinary Lloyd's policy or a similar policy of insurance by reason of the insertion therein of the clause, 'Warranted free from average under three pounds per cent unless general or the ship be stranded, sunk, or burnt.'" The valuation of the vessel on the policy was £30,000, 3 per cent upon which would be £900. During the currency

of the policy the vessel was damaged by the direct action of the seas and winds, which gave rise to a particular average of £385 : 17 : 6. It appeared, therefore, that there was a good claim against the Small Damage Association for that amount. But it was proved that on the same voyage and in the same gale the master had for the common safety to cut away portions of the rigging and make other sacrifices of ship's materials which gave rise to a general average amounting to £1288 : 6 : 11. The Small Damage Association maintained that the cost of repairing this damage should have been added to the particular average, resulting in a sum of £1674 : 4 : 5 exceeding the 3 per cent franchise, therefore not excluded from recovery under an ordinary Lloyd's policy, and consequently falling outside the liability of the Association. The matter went to the Court of Appeal, and all the judges agreed that it was the established practice in such claims not to add General Average and Particular Average together to determine whether the stipulated franchise was attained or not, and this was by their decision established as the law. The decision evoked a great deal of criticism at the time, but the case was not carried beyond the Court of Appeal, and it cannot be said that the principle it embodies imposes any hardship on any one. The Association of Average Adjusters altered their practice and rules to conform with the decision of the Court of Appeal, and the matter was finally settled by embodying the decision of the Court of Appeal in the text of the Marine Insurance Act.

§ 76. (4) For the purpose of ascertaining whether the specified percentage has been reached, regard shall be had only to the actual loss suffered by the subject-matter insured. Particular charges and the expenses of and incidental to ascertaining and proving the loss must be excluded.

This arises from the consideration that as the claim in question is one for an amount equivalent to the value of the physical damage sustained by the interest insured, up to the moment when it can be shown that there is a valid claim against the underwriter all the expenses incurred by the assured connected with examination for damage, expenses

of survey, and adjustment are for the assured's own account. Consequently, if the amount of material damage is found not to attain the minimum sum claimable on the policy, the assured loses what expense he has incurred. As a matter of fact, this does not occur quite so often as might be expected. In practice it suits the underwriter to have a survey of the damaged goods made by or through some one whom he can trust as having intimate knowledge of the class of goods and of its market value in sound and damaged condition. The assured is in many cases willing to have his interests looked after by the same expert, and thus it not infrequently happens that although the franchise is not attained the underwriter finds himself so involved in at least the survey expenses, that he faces the payment of them, taking the somewhat shadowy chance of recovery of all or even half the fees from the assured. But assuming that nothing of this kind has happened, the goods having been examined by the assured's surveyor and the claim having been stated by his adjuster, then it holds absolutely true that the expenses of proving and adjusting fall on the underwriter only when the physical damage to the goods exceeds the franchise provided in the policy.

The Act proceeds to consider the accumulation of partial losses :

§ 77. (1) Unless the policy otherwise provides, and subject to the provisions of this Act, the insurer is liable for successive losses, even though the total amount of those losses may exceed the sum insured.

This obviously refers to losses occurring during the currency of one policy. The successive losses referred to must of course be partial losses, as the occurrence of one total loss, absolute or constructive, would exhaust the capacity of the policy. In reality, the losses here referred to are losses occurring on one and the same voyage, as well as under one single policy, otherwise there would be no reason for the rule under which losses occurring on distinct voyages, but all within the period embraced by one single time policy, cannot be added together to form one claim against the underwriters on the one time policy. In such cases as *Lidgett v. Secretan*, 1871, where a partial loss occurred on

one policy and a total loss on the one immediately following, a state of affairs occurs not contemplated by this sub-section. In that case the underwriters on each policy were held liable for the loss happening on each, while here we are concerned solely with one policy. Although it is not so stated in definite words, it is almost safe to assume that in the cases to which this section of the Act is intended to apply, the repairs of the earlier accident were either completed before the second accident arose, or that if they are not so completed the damage arising in each accident was clearly distinguishable. Otherwise it is difficult to see how the losses could be considered separately from one another. Suppose a ship were to sustain damage in her masts and spars early in the voyage and at a later stage were damaged by a fire in her fore-hold, there would be no more difficulty in distinguishing the amount of damage that occurred in each accident than if the mast and spar damage had been completely repaired before the occurrence of the fire. But if the vessel had the misfortune to strike the ground twice with her fore-foot, doing herself considerable damage on both occasions, it would be practically impossible to treat this otherwise than as the result of one disaster unless repairs were effected after the first striking. There is one complication worthy of serious consideration. Suppose a vessel insured free of claims for fire struck a rock and did herself serious damage, necessitating the renewal of a good part of the keel, the amount of repairs running to 25 or 30 per cent of the ship's valuation, and that previous to the effecting of repairs she was damaged by fire to the extent of 75 or 80 per cent of her valuation, thus becoming from the combined effect of the two disasters a constructive total loss, what is the liability of the underwriter on the policy warranted free of fire? It seems inequitable that he should escape from payment entirely, but as the constructive total loss was finally brought about by a peril which he did not cover, his liability ought not equitably to exceed what it would have cost to repair the ship at the first available port after the first accident happened. If this view is correct, then it may be safe to go a step further and apply the same method in the case where the fire damage did not result in

producing a constructive total loss but only an additional amount of particular average, in which case it seems equitable that the assured should recover from the free-of-fire underwriter the damage that happened at the casualty of striking and no more.¹

If one or more partial losses for which repairs have been effected are succeeded by a total loss, the disasters leading to those losses being all caused by perils insured against, the underwriter is liable to pay the cost of the repairs of the partial losses and also a total loss on his policy. Of necessity the total loss must come at the close of the series of disasters, for the occurrence of a total loss exhausts the capacity of the policy except as regards such expenses as may be incurred in connection with attempts at salvage.

The following sub-section deals with the adjustment of certain classes of partial loss unrepaired and not otherwise made good :

§ 77. (2) Where, under the same policy, a partial loss, which has not been repaired or otherwise made good, is followed by a total loss, the assured can only recover in respect of the total loss.

The main difficulty of this clause lies in the words "otherwise made good," which are used as if they expressed an alternative course to repair. Examination of the case to which this phrase is believed to refer produces the impression that the sub-section might perhaps be more fully worded as follows :

When, during the currency of one policy, a partial loss consisting of damage which has not been repaired by or on account of underwriters, or is due to be made good by some one other than underwriters on the policy, is followed by a total loss, the assured can only recover from the underwriters on the policy in respect of the total loss.

The case in question, the *Dora Foster*, 1900, is one in which repairs were effected by charterers who under the terms of their charter became responsible for them. The vessel was

¹ See Phillips, 1136. "In case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A and the other by B, if the damage by the perils respectively can be discriminated each party must bear his proportion." But this principle is contrary to the provisions of the next sub-section of the Act. See Arnould, 819, note (b).

subsequently lost, and it was held that the underwriters on the policy of the *Dora Foster* were liable for a total loss but had nothing to do with the repairs aforesaid, as by the ship-owner's contract with the charterers the former was free from responsibility for the partial loss.

The same principle was applied by Lord Ellenborough in *Livie v. Janson*, 1810. A ship on a voyage from New York to London was insured free from American condemnation, the voyage being intended as an evasion of the American embargo. The ship in attempting to get out of New York harbour at night ran on rocks, was abandoned by her crew, seized the next day by American authorities, and subsequently condemned for violation of the American embargo. In holding that the underwriters were not liable for the loss by stranding, Lord Ellenborough said that "it seemed to be useless to be seeking about for odds and ends of previous and partial losses which might have happened on the course of the voyage, when there was one overwhelming cause of loss which swallowed up the whole subject-matter." Consequently the assured recovered nothing either for his stranding damage or for his loss by condemnation. This decision Phillips considers entirely wrong in principle, stating his views in the words of the note given in the preceding sub-section, but there is no doubt that the Act sustains Lord Ellenborough's view. The section closes in the following words :

Provided that nothing in this section shall affect the liability of the insurer under the suing and labouring clause.

These words are intended to apply to the two preceding sub-sections and to embody the suggestion of Lord Ellenborough that actual disbursements for repairs in fact made in consequence of injuries by perils of the seas prior to the happening of the total loss may be considered as covered by that authority with which the assured is generally invested by the policy of "suing, labouring, and travailing for, in, and about the defence, safeguard and recovery of the property insured." This quotation conveniently leads to the consideration of the Suing and Labouring Clause discussed in the next section of the Act.

§ 78. (1) Where the policy contains a suing and labouring clause, the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the assured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss, or that the subject-matter may have been warranted free from particular average, either wholly or under a certain percentage.

(2) General average losses and contributions and salvage charges, as defined by this Act, are not recoverable under the suing and labouring clause.

(3) Expenses incurred for the purpose of averting or diminishing any loss not covered by the policy are not recoverable under the suing and labouring clause.

(4) It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

Different sub-sections of this section stand in such close relation to one another that it is almost impossible to treat them separately, and this provision of the Act is one of such importance that it is desirable to make matters as clear as possible.

It is almost a misfortune that after the words "a suing and labouring clause," in the first line of the section, a reference was not added to the policy form in Schedule I. For without such a reference a reader of the Act might come to the conclusion that the provisions of this section hold for any clause in which suing and labouring is provided for. No doubt the absence of such a reference is due to the notorious familiarity of the terms of the ordinary sue and labour clause to underwriters and assured alike. Still, that is no good reason for omitting from the text of the Act the important elements in the clause, which are that it applies only after a disaster and refers solely to the efforts made by the assured, their factors, servants, and assigns. In the policy form of Schedule A the clause is specially marked in the margin and reads as follows :

And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travail for, in, and about the defence, safeguards, and recovery of the said goods and merchandises, and ship, etc., or any part thereof, without prejudice to this insurance; to the charges

thereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured.

Where the Act speaks of the policy containing a suing and labouring clause it means, of course, a clause containing not only the descriptions of the acts done, but also the description of the person doing them, and the undertaking to bear the expense arising therewith. But in the actual practice of many private underwriters and companies, policies issued against the Total Loss Only of any interest are issued containing the sue and labour clause down to the word "insurance," the following words referring to charges being deleted. It is conceived that the provisions of Section 78 cannot apply to such policies, the reference for liability for charges having been deliberately struck out. Further, the wording of the clause would be more correct if the conjunction between the names of the different enumerated interests were "or" instead of "and," as in the schedule policy. In that form, and in every other English and American form of policy with which the writer is acquainted, the sue and labour clause is accompanied by what is termed the "waiver" clause, which limits and completes the operation of the former in words of the following form :

And it is expressly declared and agreed that no acts of insurer or assured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

When these two clauses are taken together their effect is that if either party to the contract of insurance takes steps to safeguard or recover property covered by the policy, these steps shall not cause any prejudice or alteration in respect of the positions and rights of the parties concerned ; further, that when the assured either in person or through others (factors, servants, or assigns) does his best to avert loss, his expenses incurred in so doing are guaranteed to him by the underwriters in proportion to the sums they insure.

The sue and labour clause takes no effect until a loss or misfortune has actually occurred. It does not cover expenses incurred or the cost of operations undertaken with the object of averting the occurrence of a peril.

As this section of the Act has been drawn in view

of the cases *Kidston v. Empire Ins. Co.*, 1866-67, and *Aitchison v. Lohre*, 1879 (House of Lords), it can best be understood after a description of these cases. In *Kidston v. Empire Co.* action was brought on a policy insuring chartered freight per the *Sebastopol*, F.P.A., but with the sue and labour clause. The vessel was condemned at an intermediate port, but a ship was found to take the cargo on to destination at an expense less than the original freight. The underwriters were asked to pay their proportion of the costs incurred in so forwarding the cargo, on the ground that the shipowners, by incurring this expense after the disaster to the original ship, prevented the incidence of a total loss on the policy. The claim was based on the words of the sue and labour clause, and was held to be valid, the steps taken resulting in the incurring of these expenses having been taken by the assured, their factors, servants, or assigns. In *Aitchison v. Lohre* action was brought on a policy insuring the ship *Crimea*. Having sustained much damage from sea perils and become leaky, water-logged, helpless, unnavigable, she was in danger of being totally lost. In this state of affairs those on board signalled to the steamer *Texas* for assistance, and by her the *Crimea* was towed into Queenstown without any agreement as to remuneration. The repair or estimate for repair of the material damage to the vessel amounted to over 100 per cent of her valuation in the policy. The House of Lords decided that the indemnity for material damage was sufficiently met by a payment of 100 per cent, and disallowed the claim for salvage put forward under the sue and labour clause. The principal judgment was pronounced by Lord Blackburn, who said, *inter alia* :

“ The owners of the *Texas* did the labour here not as agents of the assured and to be paid by them wages for their labour, but as salvors acting on the maritime law, which (as explained by Eyre C.J. in *Nicholson v. Chapman*, 1793) gives them a claim against the property saved by their exertions and a lien on it, and that quite irrespective of whether there is an insurance or not, or whether if there be a policy of insurance, it contains a suing and labouring clause or not.”

Similarly, in the *Cleopatra's Needle* case (*Dixon v. Whitworth*, 1879-80), the plaintiff insured the obelisk and the carrying vessel against total loss and sue and labour charges only, insuring £3000 on vessel and obelisk, together valued at £4000. The steamer towing them had, in consequence of a severe storm, cast them off in the Bay of Biscay. Later they were picked up by another steamer, towed into Ferrol, and ultimately to London. The Admiralty Court awarded £2000 for salvage, valuing the needle and the vessel at £25,000. Dixon claimed from his policy under the sue and labour clause, but on appeal it was decided that the underwriter was not liable to pay to the assured any part of the salvage award, the ground being that as the salvors were not in the service of the assured there was no liability under the sue and labour clause of the policy; the only other peril covered by the policy, total loss, not having occurred, there was no claim against the underwriter.

The extent to which the limitation of the effect of the clause goes may be seen in the decision in *Uzielli v. Boston Marine Ins. Co.*, 1884, referring to a reinsurance against total loss and sue and labour expenses only. The plaintiffs claimed under the sue and labour clause expenses incurred by their original assured in trying to save a venture after disaster. It was held that on the reinsurance policy there was no liability for the suing and labouring expenses, because these were incurred by the original assured, who were not the factors, servants, or assigns of the assured in the reinsurance policy, that is, of the original underwriters.

From these cases and from the text of the section of the Act under discussion it may be taken that the sue and labour clause is an additional contract supplementary to the total loss and average contract, referring solely to the separate interests specified in the policy, dealing with no expenses but those incurred by the factors, servants, or assigns of those protected by the policy, and only with such expenses of this class as are incurred for the purpose of averting or diminishing a loss covered by the policy in question.

It is evident that the expenses embraced under the sue and labour clause form after all only a small proportion

of those that may be incurred to save or protect property. For it might be that the property insured could not be saved except by taking steps to save simultaneously other property not insured on the same policy. Similarly, it might be impossible to save cargo without ship or ship without cargo. It might be that the only person capable of taking the steps necessary to save all or any of the interests is not the agent of any one assured but is a person who is ready to do the work on conditions of hire, or share of value saved, or a lump sum paid down. If the assistance thus proffered is accepted, or if the operations are for the common benefit of the whole venture, the expenses are no longer recoverable from underwriters under the sue and labour clause, for the expenses are not special or individual, but common to several if not to all interests in the venture; they are not particular but general; they are not the payments of servants or factors, but the recompense of salvors; they are not Suing and Labouring Expenses, but they are General Average Expenditures or Salvage Charges (as defined in Section 65 of the Act), to be apportioned as provided in Section 73. This explains the provision of Sub-section 2. It remains to consider Sub-section 4, which was introduced into the Bill after the original draft in order to embody in the Bill the common law principle that the assured and his agents are bound to use all reasonable efforts to avert and minimise a loss. It is worth noting that in American policies the sue and labour clause reads, "It shall be lawful and necessary to and for the assured, their factors, etc., etc.," thus imposing on the assured exclusively a duty and responsibility apparently considerably exceeding the common law responsibility of the English assured.

Historically it is of interest to note that the sue and labour clause is not found in the policy of De Salizar, of 1555, nor is there any clause of that character in the Florentine form of 1523, but the policy of the *Tiger* of 1613 contains the words, "And that in case of any misfortune it shall & may be Lawfull to Labor & travile for in and aboute the defence salfegard & recouerie of the said Cloth Lead Kearsies Iron &c. or any parte or parcell therof without any preiudice to this assurance." The clause consequently,

although deemed to be supplementary to the contract, has been for at least three hundred years part of the policy. But the waiver clause is of later origin. It does not even appear in the policy on the *Maria*, 1692. While the object of the sue and labour clause is to encourage the assured, his employees, and all to whom the benefit of the insurance may have been passed, to take all possible steps to save property after an accident, there is no suggestion in it that the underwriter may take steps with the same object. That may be either because when the policy was drawn up such a proceeding was unheard of, or because the underwriter's right to take such steps was considered so unmistakable that it was unnecessary to specify it. But in time it became apparent that the assurer as well as the assured might and did in effect take steps to save the property in question, so that in modern policies the right of the underwriter to step in is indirectly secured in the wording of the waiver clause.

RIGHTS OF INSURER ON PAYMENT

§§ 79-81

The Act having in the preceding sections dealt with the various classes of claims for which the underwriter is liable, and the extent to which that liability goes, next turns to deal with the rights that accrue to the underwriter on the payment of claims made against him for such losses.

§ 79. (1) Where the underwriter pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

This clause, which is marked in the margin Right of Subrogation, recalls in some respects the words of Section 62, where in dealing with Notice of Abandonment mention is made of the assured's election to abandon the subject-matter insured to the underwriter unconditionally. It would therefore seem that in the case of a total loss where

abandonment has been tendered and payment made, there has been an implicit transfer of the property insured to the underwriter. But there are also cases of total loss in which there is no abandonment legally necessary, as is expressly pointed out in Sub-section 7 of Section 62. The provisions of the clause now under discussion seem to apply to both classes of total losses. But the wording of this section leaves it open to the underwriter, who by the payment of a total loss becomes entitled to take over the assured's interest in what may remain of the insured object paid for, to decide whether he will avail himself of the option to accept possession of this or not. Further, should he determine to accept possession, he is thereby substituted for the assured in all the rights and remedies of the latter in respect of that subject-matter, starting from the time of the accident causing loss. There is thus a limitation to his proprietorship in that it extends only to the possession of the article insured and any benefits or advantages which may have accrued since the time of the loss. It is therefore clear that the underwriter is not compelled to take over the property insured, and that even if he does take it over he is not compelled to accept any disadvantages or liabilities that might or would have come to the assured had he been the party remaining in possession.

Until the passing of the Marine Insurance Act there was considerable uncertainty whether the payment of a total loss of part put the underwriter in the same position regarding that part as that in which the payment of a total loss on the whole puts him with regard to the whole. But taking this as now settled in the affirmative by the Act, it appears certain that this can only hold good in the case of a policy in which the interest is apportionable.

Partly owing to the similarity (or perhaps identity) of the transfer occurring on acceptance of abandonment and on the payment of total loss without abandonment, partly from difficulties arising in connection with damage or liabilities arising out of property which has become a total loss, the subject of Subrogation has provoked in the past considerable discussion among lawyers and average adjusters; and even the judges have differed in their views

regarding its origin and extent. But if we can assume with safety that the result to the underwriter on payment of a total loss after abandonment is the same as that of the payment of a total loss without abandonment, then there can be no doubt regarding the intent and purport of this section of the Act, and the assumption seems fair, as all the section insists upon is payment. The intention has undoubtedly been to give him freedom from responsibility for certain burdens, such as that of the cost of removal of wreck which blocks the entrance or approach of a harbour. The assured also divests himself of responsibility for these expenses by timely abandonment, so that the legal position is as follows : The assured having abandoned ceases to be the owner of the articles in question ; his underwriter, having paid to him the indemnity agreed upon for the loss of his property, is entitled to any benefit that may come to the assured in respect of that property, to any rights the assured may have or may be able to enforce against third parties in connection therewith, back to the time of the casualty causing the loss.

The Act proceeds to deal with the case of partial losses thus :

§ 79. (2) Subject to the foregoing provisions, where the underwriter pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

This sub-section consists of two parts, the former stating that the payment of a partial loss does not give to the paying underwriter any property in the article insured or in the remaining part of it, damaged or undamaged. This is really carrying out fully the principle of the law of England, which declines to allow the consignee at destination to reject damaged cargo on the pretence that the same belongs to the underwriter through the fact of its being damaged. In other words, the law does not make a policy of insurance into a contract guaranteeing the delivery at destination and in good order of the goods insured for a certain voyage.

It is merely a contract indemnifying the assured against damage arising from named perils to the extent and in the circumstances detailed in the policy. As the payment of a partial loss does not therefore transfer any property to the underwriter, it is equitable that he should have the advantage of any reduction of the loss which may properly come to the assured, and thus put him in possession of more than indemnity. It is this consideration that leads up to the second part of the sub-section, viz. that the underwriter on payment of a loss becomes subrogated to all rights and remedies of the assured in and connected with the matter insured, back to the time of the casualty causing the loss. But this beneficial action extends only so far as indemnity has been granted by the underwriter to the assured in agreement with the Act by such payment for the loss. But what is to be made of the words at the commencement of the sub-section, "Subject to the foregoing provisions"? The previous sub-section refers solely to total loss of the whole or an apportionable part, so that these words would appear to refer to something coming earlier in the Act, presumably in the sections dealing with Measure of Indemnity. But the provisions regarding measure of indemnity are definitely specified in the final clauses of this sub-section. These words did not occur in the original draft of the Bill, nor in any of the revisions until that of 1902.

In the preceding section it has been assumed that the assured has insurance for the full value of the articles for which he has a risk. But there are two other possibilities. He may either be over-insured by double insurance or he may be under-insured. These two cases are dealt with in the two following sections :

§ 80. (1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

This enactment is a consequence of the English law of double insurance, which does not make the underwriter's liability depend in whole or in part on the date at which the risk was covered by him, as is the case in France by law,

and in the United States by special agreement. In English practice in case of over-insurance the amount of the loss is "pooled" between the whole of the underwriters concerned, each bearing that proportion of the loss which the amount of his policy bears to the total amount insured. But in case the mistake should be made of collecting the whole loss exclusively from one of the underwriters, the Act proceeds to determine thus :

§ 80. (2) If any underwriter pays more than his proportion of the loss, he is entitled to maintain an action for contribution among the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

The meaning is obvious, but the wording is unfortunate. The first portion should have read : If any insurer pays more than his proper proportion of the loss, calculated as provided in the preceding sub-section, he is entitled to maintain an action for contribution amongst the other insurers, and is entitled to the like remedies, etc., etc.

As regards the remedies at the disposal of an underwriter, in such case it seems a pity, if they are to be mentioned in the Act at all, that they are stated not definitely, but only by reference to another branch of law nowhere else referred to in the Act. This clause is merely a kind of indication to the judge before whom an action for contribution may come that the remedies at his disposal are those which he is accustomed to apply in a surety case.

Proceeding to the case of under-insurance :

§ 81. Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own underwriter in respect of the uninsured balance.

It may be suggested that the clause would be technically more complete if it read :

Where the assured is insured *on an unvalued policy* for an amount less than the insurable value, etc., etc.

It has already been pointed out that the use of unvalued policies is now so extremely rare that, except for the completeness of the enactment and the avoidance of trouble if one should happen to come by exception into use, provisions

regarding them might almost have been omitted from the Act. This clause is really of much wider application than its position in the Act would indicate: in fact, it has nothing to do with "Rights of Insurer on Payment," the heading under which it appears, but is a general and absolute statement of the position of the assured who is not fully covered. It should properly constitute a section by itself entitled "Under Insurance," and follow § 32 on Double Insurance. (See § 28, p. 37.)

RETURN OF PREMIUM

§§ 82, 83, 84. These have been dealt with above, following Sections 52, 53, 54, on premium.

MUTUAL INSURANCE

§ 85. (1) Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance.

(2) The provisions of this Act relating to premium do not apply to mutual insurance, but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium.

(3) The provisions of this Act, in so far as they may be modified by the agreement of the parties, may in the case of mutual insurance be modified by the terms of the policies issued by the association, or by the rules and regulations of the association.

(4) Subject to the exceptions mentioned in this section, the provisions of this Act apply to a mutual insurance.

This section does not carry matters very far as regards mutual insurance. While two or three, or even twenty persons may mutually agree to insure one another, it is obvious that, to obtain any width or scope for the operations of the association, a membership of even twenty will not, as a rule, be found sufficient. But as soon as the number of twenty is exceeded the association must be registered under the Companies Act, and the insurances they grant must be evidenced in marine policies, which again are subject to the provisions of the Stamp Acts. The late Lord Justice Mathew, in his decision in *Ocean Iron S.S. Assn. v. Leslie*, 1889, gives a most excellent and humorous statement of the matter:

“Now, mutual insurance is the simplest thing in the world if you have not to record it in written documents. It is the most laudable and most excellent way of effecting insurance, and is a system by which everybody insured is at once underwriter and assured, *i.e.* entitled to recover for his losses against those associated with him, and they are entitled to contributions from him for any loss sustained by any one of them. This very simple principle was acted on very successfully for many years until technical difficulties began to be interposed. The first technical difficulty was this: all mutual insurance associations were ordered to be incorporated as Joint Stock Companies. That was technicality number one. Technicality number two was that under statutes framed for different purposes, which were positive in their terms, every contract of insurance had to be a written document; in other words, there must be a policy of insurance. Those two conditions having to be complied with, the mutual insurance associations set themselves to work, by various rules, to endeavour to reconcile those strict rules of law with the conduct of their business, and different rules have been adopted, and have been framed to meet the decisions on the subject” (*Aspinall's Maritime Law Cases*, vi. 230-231).

Some Mutual Insurance Associations desiring to extend the scope of their operations have adopted Memoranda of Association, authorising the Associations to accept re-insurances at fixed rates, and it has been held by the House of Lords in *Corfield v. Buchanan*, 1913, and *John Cory & Sons, Ltd., v. Maritime Ins. Co.*, 1913, that the assured did not, by accepting these policies, become members of the Association, and therefore could not properly be put upon the list of contributors in the winding-up of the Association.

SUPPLEMENTAL

The last portion of the text of the Act, Sections 86 to 94, deals with various principles applying to the whole contract of Marine Insurance, with the interpretation of certain terms, with savings or exceptions of certain statutes and bodies

of law, with repeals, and with the date of the commencement of the Act and its short title.

§ 86. Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.

This legalisation of the extension of a contract for the benefit of a person without whose knowledge the contract was made, although it was effected on his account, seems to be from its nature almost peculiar to insurance. It is difficult to conceive any other kind of commercial contract granting after the occurrence of the contemplated disaster protection to a principal, unconscious at the time of the disaster that such a contract had been made on his account by some third party. The latest case quoted in the textbooks is that of *Williams v. North China Ins. Co.*, 1876, in which it was held that when an insurance on freight was made by the charterers of the vessel on behalf of the owners, although this did not come to the knowledge of the owners until after a loss had taken place, they were entitled to ratify and take the benefit of the policy. There is no limit stated as to the period in which this ratification must occur, so it may be taken that it must be indicated within a reasonable time after knowledge of the insurance has reached the principal, due regard being had for the means and opportunities of communication at command of the principal. It seems vastly unlikely that the courts would now admit of a lapse of two years after making the insurance, and nearly as long after the principal had become aware of the loss, although that period was actually permitted in 1814 (*Hagedorn v. Oliverson*).

But the ratification can only be made by the person on whose account the insurance was opened, and not by any other, however close their commercial relations may be. Thus it was held in 1906, *Boston Fruit Co. v. British & Foreign Ins. Co.*, by the House of Lords, that a policy effected for the protection of the shipowner cannot afterwards be adopted by a charterer of the same vessel. This provision puts a distinct limit to the very wide interpretation that might otherwise apparently be given to the extremely

indefinite wording with which the form of policy in the first schedule begins, "A. B. as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all."

§ 87. (1) Where any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatively varied by expressed agreement or by usage, if such usage be such as to bind both parties to the contract.

(2) The provisions of this section extend to any right, duty, or liability declared by this Act which may be lawfully modified by agreement.

The object of these sub-sections is to enable the assured and the underwriter to make any contravention, alteration, or variation of the contract of Marine Insurance as prescribed by English law, and particularly by this Act, by the mutual adoption of any express agreement or by the acceptance of usage if the usage be such as to bind both parties, and if the subject of alteration is one in which a modification may legally be made. The question of usage is one of great difficulty, but it is probably of diminishing importance, the tendency of the day being to express more and more fully in the words of the contract the different matters intended to be embodied in it. The form in which those arrangements of detail are formulated is usually a special clause drawn to suit the circumstances of the case, and attached as a rider to the policy.

§ 88. When by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question as to what is reasonable is a question of fact.

§ 89. Where there is a duly stamped policy, reference may be made, as heretofore, to the slip or covering note, in any legal proceeding.

In other words, although the stamped policy is the only document on which legal action can be taken, the slip may be brought in evidence with regard to points not made clear in the policy, or with a view to correction of errors in the policy. The slip is thus kept within its proper function as a *mémoire pour servir*.

The occurrence of this reference to the slip again stirs up the writer's regret that the supposed exigencies of finance cause so many insurance cases to turn on such trivial matters as stamp duty. If all slips were so drawn as to fulfil what is statutorily required for a policy, and if the policy duty was made so much per document instead of so much per cent insured, it is believed that a great benefit would accrue to the assured and to the insurance market.

§ 90. In this Act, unless the context or subject-matter otherwise requires—

“Action” includes counter-claim and set-off :

“Freight” includes the profit derivable by a shipowner on the employment of a ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money :

“Moveables” mean any moveable tangible property, other than the ship, and include money, valuable securities, and other documents :

“Policy” means a marine policy.

§ 91. (1) Nothing in this Act, or in any repeal effected thereby, shall affect—

(a) The provisions of the Stamp Act, 1891, or any enactment for the time being in force relating to the revenue.

(b) The provisions of the Companies Act, 1862, or any enactment amending or substituted for the same.

(c) The provisions of any statute not expressly repealed by this Act.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance.

The introduction of the Rules of the Common Law, including the Law Merchant, into what purports to be a code of Marine Insurance, brings something like a shock to the lay mind. But on reflection it appears that something of the kind was necessary, for only two or three portions of English law have been codified, and if these were left destitute of all connection with the rest of English law the effect would be that all the bearings of general law with the subject of these codes would be lost, however perfect the arrangements might be

of what one might call the internal details of the code. But it is none the less a defect inherent in piecemeal codification that the work cannot be systematically completed, but has to be closed up with a kind of general reference to that common law which it is the deliberate intention of the codifier to replace by the explicit provisions of his coded law. Speaking more particularly of Marine Insurance, what the present Act has done is to present in definite form the relations between the assured and the underwriter, but at no point in the Act is any suggestion given regarding the proper position of such contracts as those of Marine Insurance in a general codification of contract law.

§ 92. The enactments mentioned in the second schedule to this Act are hereby repealed to the extent specified in that schedule.

The repealed legislation referred to is the following : 19 Geo. II. c. 37. The whole Act repealed : entitled An Act to regulate insurance on ships belonging to the subjects of Great Britain, and on merchandises or effects laden thereon.

28 Geo. III. c. 56. The whole Act repealed (so far as it relates to Marine Insurance) : entitled An Act to repeal an Act made in the twenty-fifth year of the reign of his present Majesty, intituled "An Act for regulating Insurances on Ships, and on goods, merchandises or effects," and for substituting other provisions for the like purpose in lieu thereof.

31 & 32 Vic. c. 86. The whole Act repealed : entitled The Policies of Marine Insurance Act, 1868.

§ 93. This Act shall come into operation on the first day of January, one thousand nine hundred and seven.

§ 94. This Act may be cited as the Marine Insurance Act, 1906.

NOTE ON
THE MARINE INSURANCE (GAMBLING POLICIES)
ACT, 1909.

THE Act to prohibit Gambling on Loss by Maritime Perils (9 Edw. VII. c. 12), which was passed in 1909, requires no commentary. It was enacted in order to prevent the continuation or repetition of nefarious operations connected with overdue vessels. It provides that the absence of any *bona fide* interest, direct or indirect, or of a *bona fide* expectation of acquiring such interest in the safe arrival of a ship, or in the safety or preservation of a subject-matter insured, causes the contract to be deemed a contract by way of gambling on loss by maritime perils, and renders the person effecting it (the assured) guilty of an offence and liable to a term of imprisonment not exceeding six months, with or without hard labour, or a fine not exceeding £100, either punishment being accompanied by forfeiture to the Crown of any money received under the contract. The same offence is deemed to be committed by, and the same penalties are inflicted upon, any employee of a shipowner (not being part owner) who effects insurance respecting a ship, "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term. The special application of the Act to this class of persons in the employment of the shipowner is no doubt due to the belief or knowledge that many of the objectionable overdue reinsurance mentioned above were effected by persons engaged in shipowners' offices, who in the ordinary course of their employment had access to special information about the

vessels of their employers. Further, any broker or person through whom, and any underwriter with whom any such contract is effected, is treated as having committed an offence and is subjected to the same penalties, provided he acted knowing that the contract was by way of gambling on loss by maritime perils, as defined in the first sections of the Act.

The distinction drawn in the paragraphs "*a*" and "*b*" of the first sub-section of § 1, between the owners' employees and all other parties effecting insurances of the class here treated, is carried further in sub-section 5, which states that in proceedings taken against any one but owners' employees for effecting a contract, "interest or no interest," or with similar conditions, the contract shall be deemed to be a contract by way of gambling unless the contrary is proved. This shifting of the onus of proof from the prosecutor to the defendant looks as if it were intended to be for the advantage of righteousness. In reality it merely gives the assured the opportunity of clearing himself from the suspicion which he has brought on himself by using this form of policy. For it will be noted that no such opportunity is granted to the employee using the same form or one equivalent thereto: the latter's policy is summarily dismissed as a gambling policy, and this is followed by the penalties and forfeiture enacted.

In sub-section 8 it is provided that in this Act the word "owner" includes "charterer": this extension was essential to the effective working of the Act.

The rest of the Act deals with matters of procedure (including the provision that to all assured accused of infringing the provisions of this Act, except employees of the owner, an opportunity is to be afforded of showing that the contract is not a gambling contract), jurisdiction, and appeal.

To the best of the writer's knowledge no proceedings have yet been taken under this Act, from which it would appear that the mere enactment has acted as an effective deterrent.

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ADAMS *v.* MACKENZIE (1863), 13 C.B., N.S. (Willes J.)—Total loss only.

AGENORIA S. S. Co. *v.* MERCHANTS' M. I. Co. (1903), 8 Com. Cs. (Kennedy J.)—Partial loss; cost of special surveyor; circumstances justifying and allowance of.

ATCHISON *v.* LOHRE (1879), 4 A. Cs. 755 (Lord Blackburn)—Partial loss; option of abandonment; usage of thirds; sue and labour clause; salvage and general average.

AJUM GHULUM *v.* UNION MAR. INS. CO. (1901), P.C., A. Cs. 362 (Lindley L.J.)—Seaworthiness; cause of loss unascertainable; presumption; evidence; onus of proof.

ALLISON *v.* BRISTOL M. I. CO. (1876), 1 Ap. Cs. 209 (Lord Chelmsford)—Freight; prepayment; loss of part cargo; effect.

ALLKINS *v.* JUPE (1877), 2 C.P. 375 (Lindley J.)—Profits; Act of 19 Geo. II.; without benefit of salvage; wagering.

“ ALPS,” THE (MERSEY S. S. CO. *v.* THAMES AND MERSEY M. I. CO.) (1893), P. 109 (Barnes J.)—Chartered hire; perils of the sea; cesser clause; *causa proxima*.

“ ALSACE-LORRAINE,” THE (BLACKWOOD *v.* BRITISH AND F. M. I. CO.) (1893), P. 209 (Barnes J.)—Goods F.P.A., etc.; stranding; goods not on board.

ANDERSON *v.* MORICE (1876), 1 Ap. Cs. 713 (Lord Chelmsford)—Insurable interest; passing of property on shipment.

ANDERSON *v.* OCEAN S. S. CO. (1884), 10 Ap. Cs. 107 (Lord Blackburn)—Reasonable G.A. expense; contribution of cargo.

ANDERSON *v.* PACIFIC FIRE AND MAR. INS. CO. (1872), L.R. 7 C.P. 65 (Willes J.)—Misrepresentation; opinion of assured.

ANDERSON *v.* THORNTON (1853), 8 Exch. 425 (Parke B.)—Innocent misrepresentation; sailing date; return of premium.

ANGEL *v.* MERCHANTS' MAR. INS. CO. (1903), 1 K.B. 811 C.A. (Williams L.J.)—C.T.L.; value of wreck; cost of repairs.

ANGLO-CALIFORNIAN BANK *v.* LONDON AND PROVINCIAL MAR. AND GEN. INS. CO. (1904), 10 Com. Cs. 1 (Walton J.)—Guarantee; Lloyd's policy; distinct contracts; indemnity.

ANNEN *v.* WOODMAN (1810), 3 Taunt. 299 (Mansfield C.J.)—At and from; seaworthiness; return of premium.

ANON (1589), 3 Coke, P6. 47 B. 350 (Wray C.J.)—Earliest English case reported; arrest.

APOLLINARIS CO. *v.* NORD-DEUTSCHE INS. CO. (1904), 1 K.B. 252 (Walton J.)—Deck cargo; river risk; usage.

ARROW S. CO. *v.* TYNE IMPROVEMENT COMRS. (The “ CRYSTAL ”) (1894), Ap. Cs. 508 (Lord Herschell)—Harbour Act 1847; Removal of Wreck Act 1877; abandonment; owner.

ASFAR *v.* BLUNDELL (1896), 1 Q.B. 123 C.A. (Lord Esher M.R.)—Profit on lump sum C/P.; F.A.A.; loss of merchantable character of cargo; actual total loss; concealment.

ASHLEY *v.* PRATT (1847), 1 Ex. 257 Ex. Ch. (Denman C.J.)—Deviation;

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“ . . . to ports or places in China and Manilla . . . and from thence ” construed.

ATKINSON *v.* GREAT WESTERN INS. CO. (1872), 1 Asp. Mar. Cs. 382 (Daly C.J.) (American case)—Barratry; cotton on deck; want of special insurance.

ATTORNEY-GEN. FOR HONG-KONG *v.* KWOK-A-SING (1873), 5 P.C. 179 (Mellish L.J.)—Piracy.

ATTWOOD *v.* SELLAR (1880), 5 Q.B.D. 286 C.A. (Thesiger L.J.)—G.A.; sacrifices; port of refuge; practice of adjusters.

AUBERT *v.* GRAY (1863), 32 L.J., Q.B. 50 (Erle C.J.)—Restraints; temporary seizure; government of assured.

BAINBRIDGE *v.* NEILSON (1808), 10 East 328 (Lord Ellenborough C.J.)—Capture; notice of abandonment; recapture; effect on notice.

BAINES *v.* HOLLAND (1855), 10 Exch. 802 (Parke B.)—Warranty; sailing date.

BAKER *v.* TOWRY (1816), 1 Stark 436 (Lord Ellenborough C.J.)—Stranding; remaining 16 to 20 minutes sufficient to constitute.

BALLANTYNE *v.* MACKINNON (The “ PROGRESS ”) (1896), 2 Q.B. 455 C.A. (Lord Esher M.R.)—Shortage of coal; excluded losses; inherent vice; *causa proxima*; salvage; estoppel; unseaworthiness.

BALMORAL S. S. CO. *v.* MARTEN (1902), A.C. 511 H.L. (Lord Macnaghten)—Valued policy; general average contribution and salvage, liability of underwriters; valuation conclusive in all questions of indemnity.

BARBER *v.* FLEMING (1870), L.R. 5 Q.B. 59 (Blackburn J.)—Chartered freight; insurable interest; attachment of risk.

BARING *v.* MARINE INS. CO. (1894), 10 Times L.R. 276 (Lord Esher M.R.)—Policy; intention; description of risk; postal risks.

BARKER *v.* JANSON (1868), 3 C.P. 303 (Willes J.)—Valuation in time policy; good faith.

BARNARD *v.* FABER (1893), 1 Q.B. 340 C.A. (Lindley L.J.)—Warranty; “ warranted on same terms, rate, and identical interest as ”; condition precedent; rate, etc., different.

BARRACLOUGH *v.* BROWN (1897), Ap. Cs. 615 (Lord Herschell)—Removal of wreck expenses; abandonment; owners; Harbours Act 1847; Aire and Calder Act 1885.

BATES *v.* HEWITT (1867), 2 Q.B. 595 (Cockburn C.J.)—Concealment; innocent silence; Confederate cruiser.

BEAN *v.* STUPART (1778), 1 Doug. 11 (Lord Mansfield C.J.)—Warranty; margin; compliance; seamen.

“ BEDOUIN,” THE (1894), P. 1 C.A. (Lord Esher M.R.)—Chartered hire; cesser clause; *causa proxima*; concealment.

BEHN *v.* BURNESS (1863), 32 L.J., Q.B. 204 (Williams J.)—Charter-party; representation; intention; “ now in port of ”; condition precedent; warranty.

BELL *v.* BROMFIELD (1812), 15 East 364 (Lord Ellenborough C.J.)—Neutral ship and goods; liberty to carry simulated papers; consequent condemnation on capture.

BELL *v.* HUMPHRIES (1816), 2 Stark 345 (Lord Ellenborough C.J.)—Part owner requires special authority to insure for co-owners.

BENSAUDE *v.* THAMES AND MERSEY M. I. CO. (1897), Ap. Cs. 609 (Lord Halsbury)—Chartered freight; warranted free from claims consequent upon loss of time; perils of the sea; delay.

BENSON *v.* CHAPMAN (1849), 2 H.L.C. 696 (Alderson B.)—Freight; master’s duty to repair; C.T.L.; notice of abandonment; bottomry; voyage completed and freight earned; sale of vessel; freight and proceeds of ship insufficient to satisfy bond; total loss; excluded losses.

BENTON *v.* TAYLOR (1893), 2 Q.B. 281 C.A. (Lord Esher M.R.)—Charter-party; “ now sailed or about to sail ”; warranty; condition precedent.

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BERRIDGE *v.* MAN-ON INS. CO. (1887), 18 Q.B.D. 346 C.A. (Lord Esher M.R.)—"Full interest admitted"; illegality; wagering; Act of 19 Geo. II.

BUHGWANDAS *v.* NETHERLANDS SEA INS. CO. (1888), 14 Ap. Cs. 83 P.C. (Sir R. Crouch)—Foreign policy; open cover; promise to grant policy.

BICCARD *v.* SHEPHERD (1861), 14 Moore 493 P.C. (Lord Wensleydale)—Cargo "at and from" two loading ports; seaworthiness.

BIRKLEY *v.* PRESGRAVE (1801), 1 East 228 (Lawrence J.)—Definition of General Average.

BIRRELL *v.* DRYER (1884), 9 Ap. Cs. 345 (Lord Blackburn)—St. Lawrence warranty.

BLACKBURN *v.* HASLAM (1888), 21 Q.B.D. 144 (Pollock B.)—Principal and agent; concealment; broker.

BLACKBURN *v.* LIVERPOOL ST. NAV. CO. (1902), 1 K.B. 290 (Walton J.)—Bill of lading; negligence clause; perils of the sea.

BLACKBURN *v.* VIGORS (1887), 12 Ap. Cs. 531 (Lord Halsbury L.C.)—Principal and Agent; Concealment; broker.

BLACKETT *v.* ROYAL EXCHANGE (1832), 2 Cr. and J. 244 (Lord Lyndhurst C.B.)—Cumulative claims; voyage policy; memorandum; several distinct accidents; usage; exceptions to liability construed generally.

BLACKHURST *v.* COCKELL (1789), 3 T.R. 360 (Lord Kenyon C.J.)—Warranty of good safety on named day.

BLAIRMORE S. V. *v.* MACCREDIE (1898), A.C. 593 (Lord Halsbury L.C.)—Legality of underwriter's action; change of circumstances; date of bringing action; notice of abandonment; usage; prudent uninsured owner.

BOEHM *v.* BELL (1799), 8 T.R. 154 (Lord Kenyon C.J.)—Capture; defeasible interest; insurable interest.

BOLD *v.* ROTHERHAM (1846), 8 Q.B. 808 (Denman C.J.)—Substituted vessel; continuance of risk on transhipment.

BOOTH *v.* GAIR (1864), 33 L.J., C.P. 99 (Erie C.J.)—Perishable goods free of particular average; port of refuge; landing, storing and forwarding charges; sue and labour clause.

BOSTON FRUIT CO. *v.* BRITISH AND FOREIGN MAR. INS. CO. (1906), Ap. Cs. 336 (Lord Loreburn L.C.)—Ratification by charterers; benefit of ship policies; intention.

BOTTOMLEY *v.* BOVIL (1826), 5 B. and C. 210 (Abbott C.J.)—Deviation; intermediate voyage; liberty to sail backwards and forwards.

BOUILLON *v.* LUPTON (1863), 15 C.B., N.S. 113 (Willes J.)—Seaworthiness; voyage in stages; usage; sailing date; delay.

BOULTON *v.* HOULDER BROS. (1904), 1 K.B. 784 C.A. (Collins M.R.)—Discovery; ship's papers; misrepresentation; claims.

BOYD *v.* DUBOIS (1811), 3 Camp. 133 (Lord Ellenborough C.J.)—Representation; goods; fitness on shipment; spontaneous combustion.

BRADFORD *v.* SYMONDS (1881), 7 Q.B.D. 456 C.A. (Brett L.J.)—Unknown safe arrival; attachment of risk.

BRANDON *v.* CURLING (1803), 4 East 410 (Lord Ellenborough C.J.)—Alien; enemy's goods in neutral bottom; exception implied.

BRANKELOW S. CO. *v.* CANTON INS. OFFICE (1899), 2 Q.B. 178 C.A. (Smith L.J.)—See below Williams *v.* Canton Ins. Office.

"BRIGELLA," THE (TEMPERLEY *v.* MACKINNON) (1893), Probate, 189 (Gorell Barnes J.)—Vessel in ballast under charter puts into place of safety; resultant expenses held not to be claimable in general average as per alleged foreign statement.

BRIGGS *v.* MERCHANT TRADERS' ASSCE. Ass. (1849), 13 Q.B. 167 (Denman C.J.)—Payment of salvage by shipowner; lien on cargo; insurable interest.

BRISTOL STEAM NAV. CO. *v.* INDEMNITY MUTUAL MARINE INS. CO. (1887), 6 Asp. Mar. Cs. (Mathew J.)—Partial loss; obsolete vessel;

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BRITISH COLUMBIA CO. v. NETTLESHIP (1863), 3 C.P. 499 (Willes J.)—B/L.; loss of part of a machine; measure of damages.

BRITISH MAR. MUT. CO. v. JENKINS (1900), 1 Q.B. 299 (Bigham J.)—Mutual insurance; liability for calls.

BROOKING v. MAWDSLEY (1883), 38 Ch.D. 636 (Stirling J.)—Unseaworthiness; innocent shippers; Lloyd's practice; cancellation of policy.

BROOKS v. MACDONNELL (1835), 41 R.R. 336 (Lord Abinger C.B.)—Compromised settlement; subrogation.

BROOMFIELD v. SOUTHERN INS. CO. (1870), L.R. 5 Ex. 192 (Martin B.)—Bottomry; C.T.L.

BROUGH v. WHITMORE (1791), 4 T.R. 206 (Lord Kenyon C.J.)—“Furniture”; provisions of crew; usage. *

BROWN v. TAYLOR (1835), 43 R.R. 331 (Patterson J.)—Deviation; port of loading.

BROWN BROS. v. FLEMING (1902), 7 Com. Cs. 245 (Bigham J.)—Partial loss; labels and packing; actual damage; obligation to repack.

BROWNING v. PROVINCIAL INS. CO. OF CANADA (1874), 5 P.C. 263 (Sir M. E. Smith)—Undisclosed principal; total loss; inception of loss; time of loss; limit of time for presenting claims.

BROWNLEE v. CAMPBELL (1880), 5 Ap. Cs. 925 (Lord Blackburn)—Scotch conveyance; good faith; concealment and misrepresentation; obligation respecting disclosure and concealment confined to policies of insurance.

BRUCE v. JONES (1863), 32 L.J., Ex. 132 (Martin B.)—Over-insurance; several valuations.

BUCHANAN v. FABER (1899), 4 Com. Cs. 223 (Bigham J.)—Seaworthiness; salved vessel; insurable interest; description of subject-matter; disbursements; managing owners' commission, etc.

BUCHANAN v. LONDON AND PROVINCIAL MAR. INS. CO. (1895), 1 Com. Cs. (Mathew J.)—Voluntary payment of salvage by underwriters; subsequent T.L. from same disaster; extent of liability for T.L.

BURGER v. INDEMNITY MAR. INS. CO (1900), 2 Q.B. 348 C.A. (Smith L.J.)—Collision clause; “injury to such other vessel itself”; removal of wreck expenses.

BURGES v. WHICKHAM (1863), 33 L.J., Q.B.D. 17 (Blackburn J.)—Seaworthiness; river steamer; ocean voyage.

BURNAND v. RODOCANACHI (1882), 7 Ap. Cs. 333 (Lord Blackburn)—Valuation; excess actual value; Special Act of Congress; subrogation.

BURNETT v. KENSINGTON (1797), 7 T.R. 210; 4 R.R. 424 (Lord Kenyon C.J.)—Memorandum; “F.A. unless stranded” construed.

BYAS v. MILLER (1897), 3 Com. Cs. 39 (Mathew J.)—Undisclosed principal; ratification by other than original principal; usage of Lloyd's; taking up a risk; broker; principal and agent.

BYRNE v. SCHILLER (1871), L.R. 6 Ex. 319, Ex. Ch. (Cockburn C.J.)—Chartered freight; prepayment; difference between C/P. and B/L. rates.

CAHILL v. DAWSON (1857), 3 C.B., N.S. 106 (Williams J.)—Sub-broker; general lien; principal and agent.

CAMMELL v. SEWELL (1860), 29 L.J., Ex. 350 Ex. Ch. (Cockburn C.J.)—Sale; purchaser's title; law of country where sold; subsequent arrival in this country.

CARISBROOK S. S. CO. v. LONDON AND PROVINCIAL M. I. CO. (The “YESTOR”) (1902), 7 Com. Cs. 235 (Collins M.R.)—General average; vessel in ballast and under charter; contributing interests; ship underwriters' direct liability for G.A. sacrifices; set-off for freight's proportion.

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CARLTON S. S. Co. *v.* CASTLE MAIL PACKETS' Co. (1898), Ap. Cs. 486 (Lord Herschell)—Charter-party; delay in loading; natural and physical causes; knowledge of parties; reasonable time.

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RAYNER *v.* PRESTON (1881), 18 Ch. D. 1 C.A. (Brett L.J.)—Sale of insured interest; assignment of policy rights not provided for; insurable interest of vendor and vendee.

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RHIND v. WILKINSON (1810), 2 Taunt. 237 (Mansfield C.J.)—Insurable interest—it is sufficient if existing at commencement of risk.

RIVAZ v. GERUSSI (1881), 6 Q.B.D. 222 C.A. (Brett L.J.)—Floating policies; fraudulent declarations of value; concealment of on following policies; cancellation; return of premium.

ROBERTS v. SECURITY CO. LTD. (1897), 1 Q.B. 111 (Lord Esher M.R.)—Recital by policy of payment of premium; waiver of condition of prepayment of premium; burglary insurance; attachment of risk.

ROBINSON GOLD-MINING CO. v. ALLIANCE MAR. ASS. CO. (1904), H.L. 359 (Lord Halsbury L.C.)—"F.C. and S." seizure by alien government in anticipation of war within the warranty.

ROBINSON v. GLEADON (1835), 2 Bing. N.C. 156 (Parke J.)—Authority to insure; co-owners; managing owner; partners.

RODDICK v. INDEMNITY M. M. INS. CO. (1895), 2 Q.B. 380 C.A. (Lord Esher M.R.)—Warranted percentage uninsured; P.P.I. policy in excess; breach of warranty; measure of insurable value; "Hull and Machinery" does not cover coal and stores.

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ROUX v. SALVADOR (1836), 3 Bing. N.C. 266 Ex. Ch. (Lord Abinger C.B.)—Total loss; actual and constructive defined; option of assured; extent of damage; loss of species; incapability through damage of being forwarded to arrive *in specie*; justifiable sale; for whose benefit; course to be followed; prudent uninsured owner; news of loss and sale received at same time; necessity for notice of abandonment; abandonment considered and defined.

ROWLAND v. MARITIME INS. CO. (1901), 6 Com. Cs. 160 (Bigham J.)—Mutual insurance; rules; "if stranded during six months and during such period not found practicable to save, her owner may give notice and abandon"; vessel could be saved at future date; constructive total loss on notice.

ROYAL EXCHANGE v. SJÖFORSAKRINGS AKTIE-BOLAGET VEGA (1902), 2 K.B. 384 C.A. (Collins M.R.)—Time reinsurance policy; continuation clause; period exceeding twelve months through clause applying; legality; Stamp Act 1891; Courts will not construe a document nullified by laws.

RUABON S. CO. v. LONDON ASSCE. (1900), A.C. 6 (Lord Halsbury L.C. and Lord Brampton)—Partial loss; dry-docking for average repairs; opportunity taken to survey for classification; treatment of dry-dock expenses. The *Vancouver* distinguished.

RUSSELL & ERWIN MANUFACTURING CO. v. LODGE (1890), 6 Times L.R. 353 (Day J.)—F.P.A. unless stranded; all risks of craft and lighter; each lighter a separate insurance; discharge into lighter for landing; stranding of lighter.

RUSSELL v. THORNTON (1859), 4 H. and N. 788 (Bramwell B.)—Concealment, innocent non-disclosure; return of premium.

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of abandonment; issue of writ; subsequent release of vessel; time when rights of the parties are to be determined.

SADLER v. DIXON (1841), 8 M. and W. 895 (Tindal C.J.)—Seaworthiness; continuance; negligence; *causa proxima*.

ST. PAUL FIRE AND MARINE INS. CO. v. MORICE (1906), 11 Com. Cs. 153 (Kennedy J.)—F.C.S. and Detention, and consequences thereof; live stock; all risks including mortality; disease; slaughtered by order of municipal authorities; "mortality" construed; reinsurance.

"**SALACIA**," THE (1862), Lush. 578 (Dr. Lushington)—Bottomry bond on ship and chartered freight on outward voyage; advances per charter; part cargo sold at port of refuge on homeward voyage; freight due on arrival from charterers.

SAMUEL v. ROYAL EXCHANGE (1828), 8 B. and C. 119 (Lord Tenterden C.J.)—Voyage policy; reasonable despatch; delay from natural causes at destination; termination of risk.

SCARAMANGA v. STAMP (1880), 5 C.P.D. 295 C.A. (Cockburn C.J.)—C/P.; deviation; what justifies; saving human life; saving property only constitutes it unjustifiable; loss during liability.

SCHLOSS v. STEVENS (1906), 2 K.B. 665 (Walton J.)—"All risks by land and by water" construed; damage by delay; damp and worms from unusual and accidental causes; direct result.

SCHRODER v. THOMPSON (1817), 7 Taunt. 462 (Gibbs C.J.)—Embargo; voluntary delay; continuance of risk.

SCOTT v. GLOBE MAR. INS. CO. (1896), 1 Com. Cs. 370 (Mathew J.)—Floating policy; declaration; insurance by carrier for shippers; negligent omission of negligence clause in B/L.; loss consequent on negligence; personal liability of carrier; excluded losses.

SCOTT v. MANNHEIM INS. CO. (1899), *Times*, April 19 (Mathew J.)—Description of interest; "wool, skins, rugs, and general merchandise"; machinery not included.

SCOTTISH MAR. INS. CO. v. TURNER (1853), 1 Macq. H.L. 334 (Lord Cranworth L.C.)—Freight; C.T.L. of ship; abandonment after freight earned; abandoner of ship receives freight; liability of freight underwriters; losses excluded.

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SEA INS. CO. v. BLOCC (1898), 2 K.B. 398 C.A. (Smith L.J.)—Reinsurance; attachment of risk; "sailing on or after" construed; intention to proceed; shifting berth in readiness to proceed.

SEA INS. CO. v. HADDEN (1884), 13 Q.B.D. 706 C.A. (Brett M.R.)—Ship; collision proceeding to load under C/P.; C.T.L.; damages including C.P. freight recovered; contract of freight a detachable incident of ownership; subrogation; right of ship underwriters *re* recovery of chartered freight.

SEATON v. HEATH (1899), 1 Q.B. 782 C.A. (Smith L.J.)—Guarantee; insurance against insolvency of guarantor; exceptional risk; concealment; contracts of guarantee and insurance distinguished.

SELLAR v. M'VICAR (1804), 8 R.R. 744 (Mansfield C.J.)—Attachment of risk; change of voyage.

SEYMOUR v. LONDON AND PROVINCIAL M. I. CO. (1872), 41 L.J., C.P. 193 (Willes J.)—Warranted no contraband of war; goods shipped for neutral port but destined for belligerents.

SHARP v. GLADSTONE (1805), 7 East 25 (Lord Ellenborough C.J.)—Ship; seizure; C.T.L.; acceptance of abandonment; freight earned; apportionment of expenses incurred in respect of the "Salvage" of ship and freight.

SHEE v. CLARKSON (1810), 10 East 507 (Lord Ellenborough C.J.)—Broker; common agent of assurer and assured; return of premium; retainment of returns before paying over premium.

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(Kennedy J.)—Collision damage received; loss of time during repairs; *causa proxima*; remoteness; excluded losses.

SHEPHERD v. HENDERSON (1881), 7 Ap. Cs. 49 H.L. (Lord Blackburn)—C.T.L.; notice of abandonment; constructive acceptance.

SHOOLBRED v. NUTT (1782), Marshall on Ins. 4th Ed. 366; N.P. after Hil. (Lord Mansfield)—Concealment; voyage policy; disclosure of bad condition of vessel on completion of outward voyage unnecessary.

SIBBALD v. HILL (1814), 2 Dow. H.L. 263 (Lord Eldon L.C.)—Misrepresentation; fraud; no direct bearing on risk; policy void.

SIMON, ISRAEL & Co. v. SEDGWICK (1893), 1 Q.B. 303 C.A. (Lindley L.J.)—Attachment of risk; land and sea policy; change of voyage; “deviation and/or change of voyage” clause; application.

SIMPSON v. THOMSON (1877), 3 Ap. Cs. 379 (Lord Cairns L.C.)—Collision; vessels of same ownership; total loss; underwriters’ rights on payment; rights incident to ownership; subrogation.

SIMPSON S. Co. v. PREMIER UNDTG. ASSN. (1905), 10 Com. Cs. 198 (Bigham J.)—Warranted not to proceed East of S. construed; vessel lost West of S. on voyage to East of S.; condition of a renewal policy; delay in compliance with; negligence.

SLEIGH v. TYSER (1900), 2 Q.B. 333 (Bigham J.)—Seaworthiness; words used to exclude must be express, pertinent, and apposite.

SMALL v. U.K. M. M. I. ASSN. (1897), 2 Q.B. 311 C.A. (Lord Esher M.R.)—Interests of mortgagor and mortgagee are distinct; master who is mortgagor can commit barratry against mortgagee providing he was not appointed by mortgagee; policy effected by mortgagor; intention to benefit mortgagee.

SMITH v. PYMAN (1891), 1 Q.B. 742 C.A. (Lord Esher M.R.)—Insurable interest; chartered freight; prepayment if required; time of requirement.

SMITH v. ROBERTSON (1814), 14 R.R. 174 (Lord Eldon L.C.)—Capture; notice and acceptance of abandonment by underwriters; recapture; acceptance settles matters irrevocably as for a T.L.

SOUTH BRITISH FIRE AND MARINE I. Co. v. DA COSTA (1906), 1 K.B. 456 (Bigham J.)—Reinsurance; “£1000 in excess of £500” construed.

SOUTH STAFFORDSHIRE TRAMWAYS v. SICKNESS AND ACCIDENT ASSN. (1891), 1 Q.B. 402 C.A. (Lord Esher M.R.)—Accident; “from a date” and “any one accident” construed.

SPALDING v. CROCKER (1897), 13 Times L.R. 396 (Mathew J.)—Reinsurance; mistake in policy; rectification; only if on clearest evidence the mistake is common to both parties; termination of risk.

SPARKES v. MARSHALL (1836), 2 Bing. N.C. 761 (Tindal C.J.)—Insurable interest of buyers; appropriation on shipment; assignment of policy after loss.

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STANTON v. RICHARDSON (1874), L.R. 9 C.P. 390 (Cockburn C.J.)—C/P.; seaworthiness; cargo of “wet” sugar.

STEARNS v. VILLAGE MAIN REEF Co. (1904), 10 Com. cs. 89 C.A. (V. Williams L.J.)—T.L.; subrogation; gold commandeered by alien government before war; partial restitution on condition of continuing to work mine; right of underwriters to amount of restitution; interest; return not a free gift.

STEEL v. LACEY (1810), 3 Taunt. 284 (Mansfield C.J.)—Neutral vessel; no documents showing neutrality; captured and condemned for want of documents; underwriters not liable although such papers would have caused condemnation if vessel had been captured by another power.

STEPHENS v. AUSTRALASIAN INS. Co. (1872), L.R. 8 C.P. 18 (Brett J.)—Floating policy; declarations; mistake; may by usage be rectified

even after loss if made without fraud; the usage was not unreasonable and therefore binding.

STEWART *v.* GREENOCK INS. CO. (1848), 2 H.L. cases 159 (Lord Cottenham L.C.)—C.T.L.; abandonment; property vests in abandonee who is entitled to freight subsequently earned by abandoned vessel.

STEWART *v.* MERCHANTS' M. I. CO. (1885), 16 Q.B.D. 619 C.A. (Lord Esher M.R.)—Time policies limited to twelve months by Stamp Act of 1795; cumulative claims; memorandum percentage.

STEWART *v.* STEELE (1842), 5 Scott N.R. 927 (Maule J.)—Ship; measure of damages; time to ascertain loss; sold unrepaired.

STOCKDALE *v.* DUNLOP (1840), 6 M. and W. 224 (Lord Abinger C.B.)—Verbal contract of sale which could not be enforced; no insurable interest in buyer.

STRANG, STEEL & CO. *v.* SCOTT (1889), 14 Ap. Cs. (P.C.) 601 (Lord Watson)—G.A.; duty of shipowner *re* preparation of adjustment and collection; lien in support; rights of innocent cargo-owners in G.A. for losses consequent upon negligence of crew.

STRINGER *v.* ENGLISH AND SCOTTISH M. I. CO. (1870), L.R. 5 Q.B. 599 (Kelly C.B.)—Goods; capture; C.T.L.; no notice of abandonment; change of circumstances; notice of abandonment refused; sale on decree of Court; prevention of sale; security; reasonableness of; prudent owner; effect of sale; completion of loss from capture; actual total loss.

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SVENSEN *v.* WALLACE (1885), 10 Ap. Cs. 404 (Lord Blackburn)—G.A.; P.A. damage to vessel; port of refuge expenses; practice of average adjusters.

SWEETING *v.* PEARCE (1859), 29 L.J., C.P. 265 (Cockburn C.J.)—Broker; settlement of losses; usage of set-off of losses and premiums.

TAIT *v.* LEVY (1811), 14 East 481 (Lord Ellenborough C.J.)—Deviation owing to master's ignorance; breach of warranty in case of master of reasonably-competent skill.

TASKER *v.* CUNNINGHAM (1819), 1 Bligh, H.L. 87; 20 R.R. 33 (Lord Eldon L.C.)—Change of voyage; attachment of risk; discharge of underwriters from date of determination to change.

TAKE *v.* HYSLOP (1885), 15 Q.B.D. 368 C.A. (Brett M.R.)—Concealment of material fact; liability of lighterman; non-disclosure of limited liability of lighterman.

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TAYLOR *v.* DUNBAR (1869), L.R. 4 C.P. 206 (Keating J.)—Cargo of meat; delay from perils of the sea; putrefaction of meat; *causa proxima*; delay.

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THAMES AND MERSEY M. I. CO. *v.* HAMILTON (The “INCHMAREE”) (1887), 12 Ap. Cs. 484 (Lord Herschell)—“All other perils, etc.” construed and limited principle of *ejusdem generis* applied; perils of the sea; negligence.

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THOMPSON v. REYNOLDS (1857), 26 L.J., Q.B. 93 (Lord Campbell C.J.)—Collision; sale of ship to satisfy claim for damages; liability under collision clause limited to amount of damages paid and not to insured value of vessel.

TOBIN v. HARFORD (1865), 34 L.J., C.P. 37 Ex. Ch. (Pollock C.B.)—Meaning of word "cargo"; valuation; short interest.

TODD v. RITCHIE (1815), 1 Stark 240 (Lord Ellenborough C.J.)—Barratry; a crime; an act of the master against his better judgment.

TRINDER v. THAMES AND MERSEY M. I. CO. (1898), 2 Q.B. 114 C.A. (A. L. Smith L.J.)—Freight; master also owner; ordinary negligence by master not equivalent to "dolus" or wilful conduct does not relieve underwriters; cargo coal; impossibility of forwarding; sale of cargo; notice of abandonment unnecessary.

TUNNO v. EDWARDS (1810), 12 East 488; 11 R.R. 458 (Lord Ellenborough C.J.)—Contingent total loss; no notice given; 50 per cent paid by underwriters on account; intention not to vary rights of parties; change of circumstances; partial loss.

TURNBULL v. HULL UNDTG. ASSN. (1900), 2 Q.B. 402 (Mathew J.)—"Freight on . . . chartered or as if chartered" damage to refrigerating machinery at loading port; delay for repair; unable to carry cargo engaged; *causa proxima*; detention within warranty of "consequent on loss of time."

TURNBULL v. JANSON (1877), 3 Asp. Mar. Cs. 433 C.A. (Brett L.J.)—Voyage policy; seaworthiness; vessel built for inland navigation; ocean voyage.

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TYRIE v. FLETCHER (1777), 2 Cowl. 666 (Lord Mansfield C.J.)—Return premium; cover "for twelve months F.C. and S. and consequences" is entire and loss after two months does not entitle to a return.

TYSER v. SHIPOWNERS' SYNDICATE (1896), 1 Q.B. 135 (Mathew J.)—Lloyd's policy; signature for syndicate; contracts are several.

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UNION M. I. CO. v. MARTIN (1866), 35 L.J., C.P. 182 (Erle C.J.)—Overlapping policies; intention to supersede first policy; double insurance; liability of reinsurer on superseding policy.

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USHER v. NOBLE (1810), 12 East 639 (Lord Ellenborough C.J.)—Goods; open policy; amount recoverable.

USPARICHA v. NOBLE (1811), 13 East 332; 12 R.R. 360 (Lord Ellenborough C.J.)—Alien enemy (Spanish) residing in this country; license to trade with Spain in neutral vessels; legality of insurance on such adventure; right to sue in English Courts on loss from capture by Spanish ally (French).

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VAGLIANO *v.* BANK OF ENGLAND (1891), Ap. Cs. 107 (Lord Herschell)—Construction of codifying Act; resort to previous state of the law only where the Act is ambiguous.

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VANDYCK *v.* HEWITT (1800), 1 East 96; 5 R.R. 516 (Lord Kenyon C.J.)—Illegal insurance; policy void; no return of premium though underwriters not liable for any loss.

“VORTIGERN,” THE (1899), P. 140 C.A. (Smith L.J.)—Seaworthiness; same in policies as in contracts to carry; usage of dividing voyage into stages *re* bunkers; shortage of bunkers; cargo burnt as fuel.

WAUGH *v.* MORRIS (1873), L.R. 8 Q.B. 202 (Blackburn J.)—Illegal contract; C/P.; plea of illegal contract no answer to claim for demurrage when contract can be and is performed in legal manner.

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WELLS *v.* HOPWOOD (1832), 3 B. and Ad. 20 (Lord Tenterden C.J.)—Stranding; tidal harbour; stretching of rope when taking ground.

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WESTERN I. CO.; *ex parte* (1892), 2 Ch. 423 (Stirling J.)—Reinsurance “to pay as may be paid”; actual payment not a condition precedent.

WEST OF ENGLAND FIRE INS. CO. *v.* ISAACS (1896), 2 Q.B. 377 (Collins J.)—Assured may not prejudice indemnifier by renouncing rights which would reduce the loss; subrogation.

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WESTWOOD *v.* BELL (1815), 4 Camp. 349 (Gibbs C.J.)—Broker who effects policy has lien on it although only sub-broker.

WETHERELL *v.* JONES (1832), 3 B. and Ad. (Lord Tenterden C.J.)—Illegal adventure defined.

WHINCUP *v.* HUGHES (1871), L.R. 6 C.P. (Bovill C.J.)—Return of premium; apprentice; general rule; unreturnable for part performance unless clearly severable.

WHITWORTH *v.* SHEPHERD (1884), 22 Sc. Law. Reporter 157 (Lord Ordinary McLaren)—Acceptance of abandonment by some underwriters; not by all; position respecting transfer of interest.

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WILSON *v.* CARGO *ex* “XANTHO” (1887), 12 Ap. Cs. 503 (Lord Herschell)—“Perils of the sea” ; collision a peril of the sea ; in policies and contracts to carry ; operation of collision as peril of the sea in policies and contracts to carry explained.

WILSON *v.* JONES (1867), L.R. 2 Ex. 139 Ex. Ch. (Blackburn J.)—Insurable interest ; description ; gaming or wagering ; policy on successful termination of an adventure ; laying of Atlantic cable, test of success being transmission of 100 words.

WILSON *v.* MARTIN (1856), 11 Ex. Ch. 684 (Pollock C.B.)—Insurable interest ; description ; “advances on account of freight.”

WILSON *v.* NELSON (1864), 33 L.J., Q.B. 220 (Blackburn J.)—Valued policy ; £1300 on freight.

WILSON *v.* RANKIN (1865), L.R. 1 Q.B. 162 Ex. Ch. (Erle C.J.)—Policy on freight ; deck cargo in contravention of Act ; ignorance of owner ; general authority of master ; want of clearance certificate does not make the vessel unseaworthy for want of documents.

WILSON *v.* SALAMANDRA ASS. CO. (1903), 8 Com. Cs. (Bruce J.)—Re-insurance ; Lloyd’s ; knowledge of Lloyd’s agents ; concealment.

WINGATE *v.* FOSTER (1878), 3 Q.B.D. 582 C.A. (Brett L.J.)—Salvage pumps “to, at and from wreck” lost on wreck after floating while on voyage to port of safety ; deviation.

WOODSIDE *v.* GLOBE MAR. I. CO. (1896), 1 Q.B. 105 (Mathew J.)—“Against fire or explosion only” ; C.T.L. from stranding ; destroyed by fire shortly after stranding.

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XENOS *v.* FOX (1869), L.R. 4 C.P. 665 Ex. Ch. (Cockburn C.J.)—Costs defending collision suit ; sue and labour clause ; requires special agreement ; collision clauses.

XENOS *v.* WICKHAM (1867), L.R. 2 H.L. 296 (Lord Chelmsford)—Broker and Company ; completion and delivery of contract ; authority of broker to cancel policy.

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EXTRACTS FROM JUDGMENTS IN LEADING CASES

AITCHISON *v.* LOHRE (1879)

HOUSE OF LORDS, LAW REPORTS, NEW SERIES, vol. iv.
APPEAL CASES, page 755.

Policy of Marine Insurance—Indemnity—Partial loss—Suing and labouring clause.

A POLICY of Marine Insurance is not a contract of mere indemnity.

General average and salvage do not come within either the words or the object of the suing and labouring clause of a policy of Marine Insurance.

The assured, who had not abandoned but had elected to repair after damage sustained from perils of the sea, was not entitled to recover under the sue and labour clause the expenses of salvage, but was entitled to recover up to the amount insured the cost of repair with the deduction of one-third new for old, even although the amount calculated upon that principle should exceed the amount that would be payable upon a total loss with benefit of salvage, and should equal the whole sum insured.

The ship *Crimea*, of a sound market value of £3000, was insured with the defendant for £1200, valued £2600, and during the voyage encountered very bad weather and was in danger of sinking. She was rescued by a steamer which was awarded £800 salvage money in the Irish Admiralty Court. The owner did not abandon but elected to repair. Defendant's proportion of repair expenses, after deduction of one-third new for old, amounted to £1200, the whole sum insured by him, and he was held liable for that amount, but not liable for any part of the salvage expenses.

LORD BLACKBURN (at page 761): "The contract of insurance is a contract of indemnity. . . . But as was said in the opinion of the Judges in *Irving v. Manning*:

'A policy of insurance is not a perfect contract of indemnity, it must be taken with some qualifications.'

One of these is commonly expressed as the allowance of one-third new for old. . . .

"The owner of an insured ship which is so damaged that, though it is capable of repair, the expense of repairing it will exceed its value, may treat the ship as totally lost, and recover a total loss, the underwriters who pay for that total loss being entitled to all that is saved. The assured is not even then bound to do so. But if the ship can be practically repaired within the meaning of that phrase, as explained by Mr. Justice Maule in *Moss v. Smith*, the

assured has not the option to treat it as a total loss; and on the figures stated in the special case the respondent here had not that option. He may repair the damage done by the peril insured against, and if he does so the damage would in general be what would be the reasonable cost of making the ship as good as it was before. The actual outlay on the repairs, if *bona fide* made, would be strong evidence what the reasonable cost was, and if the ship was by that outlay made more valuable than it was before the accident, which would generally be the case with an old ship, there should be an allowance for this increased value. . . .

"I think it is clearly established by a long course of practice and by many decisions that for the purpose of avoiding the expense of litigation a custom of trade has arisen which, though not written in the policy, is implied in it. The parties to a policy of insurance on ship tacitly agree that, in case of repairs fairly executed, to replace damage occasioned by one of the underwritten perils to a ship of the age and character to which the custom applies, the loss shall be estimated at two-thirds of the cost of repairs, neither more nor less.

"This is a case of a single loss, as to which Phillips says that we know

'the liability of insurers in a single loss is without question limited to the amount insured, and the expense of suing, etc.'

No authority in contradiction to this was cited, and I am not aware of any; and the position thus laid down in Phillips was adopted by all the judges below, who limited the amount recoverable under the policy so far as it related to the indemnity for the underwritten perils to 100 per cent, or in this case £1200. . . . I think it clear that they were right. . . .

"The policy contains the usual clause as to suing and labouring. . . . I think that general average and salvage do not come within either the words or the object of the suing and labouring clause, and that there is no authority for saying that they do. The words of the clause are that in case of misfortune it shall be lawful 'for the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of, the subject of insurance, without prejudice to this insurance, to the charges whereof we, the insurers, will contribute.' And the object of this is to encourage and induce the assured to exert themselves and therefore the insurers bind themselves to pay in proportion any expense incurred whenever such expense is reasonably incurred for the preservation of the thing from loss in consequence of the efforts of the assured or their agents. It is all one whether the labour is by the assured or their agents themselves or by persons whom they have hired for the purpose, but the object is to encourage exertion on the part of the assured; not to provide an additional remedy for the recovery, by the assured, of indemnity for a loss which was by the maritime law a consequence of the peril. In some cases the agents of the assured hire persons to render services on the terms that they shall be paid for their work and labour, and thus obviate the necessity of increasing the much heavier charge which would be incurred if the same services were rendered by salvors. . . . I do not say that such hire may not come within the suing and labouring clause. But that is not this case. . . . The amount of such salvage occasioned by a peril has always been recovered without dispute under an averment that there was a loss by that peril . . . but at

least there is no authority for the position that salvage (properly so called) was recoverable under the count for suing and labouring."

Lords Cairns, Hatherley, and O'Hagan concurred.

ALLISON *v.* THE BRISTOL MARINE
INSURANCE COMPANY, 1875

HOUSE OF LORDS; LAW REPORT; 1 APPEAL CASES, page 209.
Policy on freight—Prepayment.

A ship was chartered to sail from Greenock to Bombay to carry a cargo of coals, freight to be paid on unloading and right delivery of cargo at and after the rate of 42s. per ton of 20 cwt. on quantity delivered. Such freight to be paid "say one-half in cash on signing bills of lading less . . . 5 per cent for insurance . . . and the remainder on right delivery of the cargo. . . ." Half the estimated amount of freight was paid in London. The shipowner effected insurances of £500 on freight valued at £2000 and £700 on freight payable abroad valued at £2000. The vessel was lost before entering Bombay Harbour, but one-half the cargo was saved and delivered. The master, believing the prepayment had satisfied the freight on this half so delivered, made no demand on the charterers, and the shipowners claimed on their policies for a total loss of the other half of the freight:

Held, that on the proper construction of the policy the whole sum agreed upon constituted freight; that half of the whole sum of that freight had been paid in England; that it was not a prepayment of half the rate of freight calculated as distributed over the whole cargo but of half the whole gross freight; that half of the whole remained to be paid abroad on right delivery of the cargo; that that half had been lost through perils of the sea, and that the shipowner was entitled on his policies on freight to recover as for a total loss of that half.

LORD CHELMSFORD: "In considering the question it is necessary in the first place to determine the character of the payment which was made by the charterer at the time of signing the Bills of Lading. Was it an advance in the nature of a loan or was it a prepayment of half the freight, the whole of which was to be earned by the unloading and delivery of the cargo at Bombay? . . . Here the parties by the charter-party have agreed that the payment shall be the advance of half the freight. . . . The charter-party contains a provision for the charterer to deduct from the payment of half freight 5 per cent for insurance, and Mr. Justice Blackburn in his opinion delivered to the House stated

'that it had always been held that a stipulation that the merchant is to insure the amount is almost conclusive to show that it is not a loan on security of freight to be earned but an advance of freight.'

There can be no doubt therefore that the sum paid by De Mattos was a prepayment of freight, and as such, according to settled authorities, could not be recovered back again. That portion of the freight received by the plaintiff was therefore never at risk on the voyage insured. . . . I think that the freight payable is the freight upon the whole quantity of coals delivered at the rate of 42s. per ton,

and the part which was prepaid was assumed upon an estimate of half of that quantity. . . . If the prepayment was meant to be applied to half the rate of freight over the whole number of tons of coal shipped, the amount could have been easily ascertained and the intention clearly expressed. The manner in which the half of the freight was agreed upon satisfied me that the sum paid was taken generally as representing one-half of the entire freight of cargo at the rate of 42s. per ton.

" This being my view of the case it follows that the plaintiff never had more than half the freight as a gross sum at risk on the voyage insured. If all the coals had been delivered he would have had to receive the amount of the whole agreed freight minus the £2286 already paid. In the event which had occurred he had secured himself against the loss of half the freight by the prepayment; the only insurable interest in the freight which remained to him was the unpaid half, the whole of which he lost by the perils of the sea, and therefore his loss was a total loss."

Lords Hatherley, Penzance, O'Hagan, and Selborne delivered judgments to the same effect.

THE "ALSACE-LORRAINE" (1893) (BLACKWOOD,
BRYSON & CO. v. BRITISH AND FOREIGN
MARINE INSURANCE COMPANY)
PROBATE, page 209.

The plaintiffs effected with the defendants an insurance on a parcel of rice on a voyage from Calcutta to Demerara or Barbadoes in a named ship. The policy contained the common memorandum, by which rice is warranted free from average unless general or the ship be stranded, and a special memorandum by which the rice was "warranted free from particular average unless the ship be stranded. . . ."

The ship, which was chartered by the plaintiffs to carry a cargo of rice, including the parcel in question, was of French nationality. She encountered heavy weather, obliging her master to jettison some of the rice, and subsequently to put into Mauritius for repairs. To effect these repairs the cargo was discharged; and part of it, including some of the rice in question, being damaged, was condemned as unfit to be forwarded and sold. Whilst the vessel was being repaired, and whilst the whole of the cargo was on shore, a cyclone burst over the island, during which the vessel stranded, and was found to have sustained such damage that she was condemned and abandoned. The remainder of her cargo was subsequently shipped on board a British vessel, and after a portion of it, including some of the rice in question, had been, in the course of the voyage, damaged by sea perils, it was finally delivered at Barbadoes. Freight *pro rata itineris* was, according to French law, paid by the plaintiffs on all the rice discharged from the French vessel at Mauritius.

The defendants paid their proportion of general average and forwarding charges, but disputed the plaintiffs' claim for £153:13:3 for a particular average loss on the rice sold at Mauritius, and on that subsequently damaged in the British vessel, including the *pro rata* freight charged against the rice:

Held, that the defendants were not liable as the stranding took place at a time when the insured goods were not on board the vessel,

and therefore the warranty against particular average remained in force.

GORELL BARNES J. (at page 213, after referring to the nature of the case and terms of the charter-party and policies) said :

"The defendants contended, first, that the F.P.A. warranty in the policies was not deleted, and that they are consequently not liable for anything coming under the head of particular average; secondly, that they are not liable for the distance freight paid to the owners of the *Alsace-Lorraine* at Mauritius.

"The first point depends upon whether or not the ship was stranded within the meaning of the memorandum so as to delete the warranty, because if the ship was so stranded the defendants are liable for the particular average loss, but if the vessel was not so stranded they are not liable.

"There is no dispute about the facts connected with the stranding, but those facts give rise to a new point in the construction of the memorandum. The plaintiffs maintained that the stranding took place in the course of the adventure, and that therefore the warranties against particular average are deleted. The defendants, on the other hand, maintained that as the stranding took place when no part of the rice was on board the vessel, the warranties remain in force. There is some lack of precision in the plaintiffs' proposition, but I understand it to mean that the warranties are deleted if the vessel be stranded after the shipment of the goods and while they are covered by the policies, and while the vessel is still engaged under the contract of carriage, even though at the time of the stranding the goods are not on board the vessel.

"I do not think the plaintiffs' counsel were able to cite any case or refer to any principle which would establish this proposition.

"In my opinion the defendants' proposition is in accordance with principle and the authorities.

"In the recent case of the *Glenlivet* I have already dealt with the introduction of the memorandum and the construction of the words 'unless the ship be stranded' as a condition; but I may add that the judgments in *Burnett v. Kensington* seem partly based upon the consideration that where a vessel was stranded the underwriters, in order to avoid a difficult inquiry as to whether or not the damage arose from the stranding or how much was owing to that cause, agreed to consider the loss to have happened in consequence of the stranding.

"The stranding in that case took place while the goods were on board the vessel, and all the observations of the judges are applicable to such a condition of things only, and I do not think they could possibly have imputed to the underwriters a consent to treat the damages on the voyage as due to a stranding if the stranding occurred when no goods were on board.

"In all the cases I have been able to refer to, except two, the stranding occurred while the goods were on board the vessel. One exception is in the case of *Roux v. Salvador*, where goods had been insured free of particular average unless the ship were stranded and were necessarily sold at a port of refuge, and the vessel with the rest of her cargo proceeded on her voyage and was afterwards stranded. The court decided that there was under the circumstances a total loss, and the question of stranding therefore did not arise. But Lord Abinger said: 'It has been contended that the fact of stranding being a condition to let in the claim for a partial loss, it is not material

whether the stranding takes place whilst the goods insured are on board or after they have been landed. We are not prepared to adopt that conclusion, but the view we take of this case renders it unnecessary to enter into any discussion of the argument or to pronounce any opinion upon it.

"The other exception is the case of the *Thames and Mersey Marine Insurance Company v. Pitts, Son, & King*, in which a steamer coming down the river Plate stranded with one parcel of insured goods on board before reaching Buenos Ayres, where she shipped another parcel of insured goods, which were lying waiting for her in lighters at the time of stranding. A large portion of the insured goods sustained damage on the voyage from Buenos Ayres to Europe, but it was held that the assured could not recover for the damage to the parcel shipped at Buenos Ayres because of the warranty against particular average unless the ship or craft should be stranded, as the stranding did not occur while those goods were on board the vessel, though they were at risk under the policy in the craft at the time of the stranding. It is from this case that the plaintiffs' counsel take the words 'stranding in the course of the adventure'; but it seems to me from the whole tenor of the judgments the judges were dealing with the adventure while it lasted on board the vessel.

"In Phillips on Insurance, s. 1761, the author says: 'The doctrine adopted in England appears to be, that after a stranding the construction of the policy is the same in respect to all losses on goods on board at the time of stranding, whether happening before or after the stranding, as if it had not contained this exception.'

"Arnould (*Marine Insurance*, 6th ed., p. 823) says: 'The meaning of the memorandum, therefore, is—then the author gives one or two matters which are not material on this point—' if the ship be stranded while the memorandum articles are on board, then the underwriter is liable to pay all particular average losses, whether caused by the stranding or not, just as though the memorandum did not exist.'

"In my opinion it is obvious that the memorandum requires the implied insertion of some words qualifying the generality of the words 'stranded, sunk, or burnt' as regards time, and that there should be some such implication as 'while the goods are on board the vessel which is stranded, sunk, or burnt.'

"It was practically conceded in argument that as all connection between the goods sold at Port Louis and the *Alsace-Lorraine* had been severed by the sale of those goods before the accident, no claim could, according to the case of *Roux v. Salvador*, be made for a particular average loss in respect thereof, but the claim for a particular average loss in respect of those forwarded by the *Brazil* was maintained, although they were not on board at the time of stranding, and although the damage happened to them while they were on board the *Brazil*. For the reasons I have given I think this claim is not maintainable, and in my opinion the fact that it was contemplated that they should be reloaded on the *Alsace-Lorraine* up to the time of the stranding makes no difference. It never can have been contemplated, and would be unreasonable to hold, that a stranding at a time when the insured goods were not on board the vessel should delete the warranty against particular average.

"I think, therefore, that the plaintiffs' claim for a particular average loss entirely fails, and it is unnecessary to express any opinion upon the second point, which only affects the amount of the

particular average loss if any had been recoverable. Nor is it necessary to say anything about the points which were touched upon in argument but do not arise in this case, namely, as to the effect on the warranty of the stranding of a substituted vessel or the stranding of the one vessel, when the damage occurs in the other.

"The judgment will therefore be for the defendants with costs.

"I ought to say that I have assumed in this judgment that the sale took place before the accident, but I do not think it is really material."

BALLANTYNE *v.* MACKINNON (1896)

COURT OF APPEAL, Q.B.D., vol. ii. page 455.

Estoppel—Ship—Marine Insurance—Judgment for salvage in Admiralty Division—Action against underwriter—Defence that loss did not arise from perils insured against.

A steamer during a voyage in which she had encountered fine weather ran short of coal and the master engaged a steam trawler to tow her to her port of discharge. The owner of the trawler recovered a sum of money in the Admiralty Court for salvage. In an action by the owners of the steamer to recover from an underwriter who had insured the ship against perils of the sea the amount paid under the judgment:

Held, that the defendant was not precluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against.

A. L. SMITH L.J. delivered the judgment of the Court, consisting of Lord Esher M.R., Kay and Smith L.J.J.

"The defence set up is that the loss sued for did not arise from a peril of the sea but solely from the vice of the subject-matter insured, in particular that the loss arose solely in consequence of the plaintiff's ship when she sailed having an insufficiency of coal on board for the contemplated voyage, and without the intervention of any sea peril, and this is what, as we understand, the Lord Chief Justice has found to have been established by the evidence before him.

"We agree with the argument of the plaintiff that if the judgment of the Lord Chief Justice is to be read as holding that the services rendered to the plaintiff's ship, for which he had to pay £350, were proximately caused by a sea peril, though remotely and substantially brought about by the condition of the ship, or, in other words, that if there was a sea peril to the ship by reason of its then condition, *i.e.* the shortness of coal, the Lord Chief Justice would have been wrong in holding as he did that the underwriters were not liable; and the case of *Dudgeon v. Pembroke* in the House of Lords is conclusive as to this.

"The Lord Chief Justice says:

'It was admitted by the plaintiff that there was no weather which rendered salvage assistance necessary, and that the need of assistance of the trawler and the tug was occasioned by the want of coal. . . . In other words it was the unseaworthiness of the ship which caused the need—if need there was—of salvage aid, and no peril of the sea caused or contributed to the necessity for the aid.'

As before stated, we agree with the Lord Chief Justice when he held

upon the evidence before him that the loss sustained was not occasioned by a peril of the sea, for in our judgment the loss arose solely by reason of insufficiency of coal with which the ship started upon her voyage, the consequence of which was that what in fact did happen must have happened, namely, that the ship ran short of coal, no sea peril bringing this about in any shape or way, or placing the ship in a position of danger thereby.

"But a further point is now taken before us which was not taken before the Lord Chief Justice, and it is that the Admiralty Court has held that the owner of the steamship *Progress*, her cargo and freight, were liable to the owner of the steam trawler for salvage services amounting to the sum of £350 . . . and it is said this judgment concludes the matter as to the existence of a supervening peril of the sea.

"The owners of the *Progress* in that suit admitted that salvage services had been rendered to her by the steam-trawler and paid £300 into Court, and asserted this amount was sufficient recompense to the plaintiffs. . . . Upon what grounds the owners of the steamship admitted that £300 was due does not appear; . . . it is immaterial for the reasons given below to inquire. That this suit was a proceeding against the steamship *Progress*, and that the judgment was a judgment *in rem* which constituted an effective lien upon the steamship we do not doubt, but the defendant was no party to this suit, and the question is as to what as against the defendant is this judgment conclusive. . . .

"Now what was the point decided by the judgment *in rem* in the Admiralty Court in the present case? It was that a valid maritime lien to the amount of £350 attached to the steamship *Progress*, and that to this extent its status was conclusively determined.

"It was argued that there might be a claim for salvage without the intervention of a sea peril, and the judgment of Dr. Lushington in the *Batavier* was cited. It is not necessary to decide whether this can be so; but we say if it can, then such a salvage claim is not recoverable upon a policy against sea perils for the obvious reason that the risk covered will not have occurred.

"For these reasons we think the appeal should be dismissed."

S.S. "BALMORAL" COMPANY *v.* MARTEN (1902)
APPEAL CASES, HOUSE OF LORDS, page 511.

In an insurance on ship . . . the ship was insured for the sum at which she was valued in the policy. During the currency of the policy a general average loss occurred, and a sum awarded in a salvage action had to be paid. In the salvage action the value of the ship was proved to be above the policy value. In the average statement the proved value was taken as the contributory value of the ship and the rights of all parties adjusted on that footing. In an action on the policy:

Held, that the underwriters were liable only for that proportion of the salvage and general average losses which the policy value bore to the proved value.

LORD MACNAGHTEN (at page 512): "My Lords, the question in this case is of little consequence as regards the money value of the claim. It is important in its bearing on a rule of practice which has prevailed with underwriters and average staters in this country for a long period.

"Ship, cargo, and freight have had to contribute to general average and salvage charges. For the purpose of contribution the values of the ship, cargo, and freight at risk were ascertained. There is no question as to the value of the cargo or of the freight. The value of the ship was taken at £40,000, that being the amount at which it was valued in the salvage proceedings. Contribution from the ship in respect of general average and salvage charges works out at £530 : 8 : 8. This amount is claimed from the underwriters. The underwriters say 'That may be the proper amount of contribution as between ship, cargo, and freight, but as between us and you the policy on the ship is a valued policy. It was stipulated that "for so much as concerns the assured by agreement between the assured and assurers" the ship, with its machinery and everything connected therewith, was valued at £33,000. As the value in the policy is so much less than the contributory value, we are only bound to pay a proportionate amount, or $\frac{4}{5}$ ths of the ship's contribution.' To this the shipowners answer, 'You are opening the policy. The ship was fairly valued at £33,000. That value as between you and us must hold good for all purposes. You have nothing to do with the value put upon the ship at a different time and for a different purpose. It is impossible to determine with any degree of accuracy the value of a thing which is not an article of commerce. The agreed value in the policy is, or was at the time of the agreement, just as truly the "real value" as the value arrived at somehow or other in the salvage proceedings. The ship was fully insured, and you must make good the loss just as you would have had to reimburse the cost of repairs made necessary by sea damage.'

"Many authorities were cited, and all available text-books were referred to. But speaking for myself, I must say that I think little help is to be obtained from text-books or reported cases. No case was cited which has more than a very remote and indirect bearing upon the question. Mr. Phillips, who upholds the English practice as against the New York practice for which the appellants contend, puts the case very fairly when he says (s. 1410), 'There is nothing in the policy that favours one of these modes of construction in preference to the other, each being consistent with the language of the instrument.' His conclusion is that the question must depend upon the application of 'the general principles of insurance.'

"But, my Lords, I do not think one gets rid of the difficulty by referring it to the general principles of insurance. It seems to me that there is as much to be said on the one side as on the other. And although I think, if the matter were *res integra*, I should prefer the English rule, my preference would be based on this consideration—that the law of Marine Insurance in this country, although anomalous in many respects, is eminently practical. Just as the agreed value of the ship is disregarded when the question is whether a prudent uninsured owner would repair or abandon, so where there has been a value put upon the ship by a competent authority, or adopted by a competent authority, or treated as binding in a business transaction, it seems to me that that value, whether it has or has not the better right to the title of 'the real value,' cannot be left out of consideration. And I think it is a salutary rule and not unreasonable that the underwriter's liability under the policy should be adjusted with regard to it.

"However that may be, I do not think that Mr. Hamilton, in his able argument, succeeded in proving that the English rule is contrary

to principle. That being so, there is, in my opinion, an end of the case, and discussion on the comparative merits of the English rule and the New York rule becomes academical.

"The rule that prevails with English average staters is a rule that has been long established. It is well known, and it must have helped to form the basis of a vast number of contracts which are still running, some of which may run for twelve months to come. In that state of things it seems to me that if the English rule is to be altered it must be altered by Parliament and not by a decision of this House. It would be open to Parliament if it should see fit to enact a new rule to fix a date for its coming into operation, and so avoid any semblance of injustice to those who have contracted on the footing of the old rule.

"Stirling L.J., in his judgment in the Court of Appeal, expresses an opinion that theoretically the sum recoverable would be that which would be payable if the agreed value in the policy had been employed in the average adjustment. I venture to think so too. The mode of calculation adopted by the average staters seems rather too favourable to the underwriters. Suppose the value of the ship in the policy and also for purposes of contribution to be £16,000, the value of the cargo and freight to be £12,000 and the total amount required to be £840, the ship would then pay four-sevenths or £480. Then suppose the ship for the purpose of contribution was valued at £18,000, the value of cargo and freight remaining the same, the ship would pay three-fifths or £504, that is, £24 more than if the value for the purpose of contribution had been the same as the value in the policy. But if you reduce the ship's contribution in the proportion of 18 to 16 the underwriters have only to pay nine-eighths of £504 or £448, that is, £32 less than would have been payable if the contributory value had been the same as the value in the policy. But there, again, the rule is well established, and though I do not think it is quite accurate, I do not think it ought to be disturbed. Though the rule only speaks of general average, it has always been treated as applying to salvage expenses also. I do not think that any distinction ought now to be made between these two heads of expenditure.

"The part of the rule which says that the insurers are not to pay more than the ship's contribution, although the contributory value be less than the value in the policy, seems to me unobjectionable, as the contract of insurance is a contract of indemnity.

"In the result, therefore, I move Your Lordships that the appeal be dismissed with costs."

Lords Shand, Brampton, and Lindley delivered judgments to the same effect, and Lord Robertson concurred.

BARBER *v.* FLEMING (1869)

5 Q.B., page 59.

Interest in chartered freight—Marine Insurance.

The plaintiff on 7th August 1866 chartered his ship C, "now lying at Bombay," for a voyage from Howland's Island to a port in the United Kingdom for a full cargo of guano, freight to be paid at port of discharge; ship to be at island on or before 1st June 1867, or charterers to have the option of cancelling. On 7th September 1866 plaintiff effected an insurance with defendant at and from Bombay to Howland's Island while there, and thence to any port

in the United Kingdom on freight chartered or otherwise, valued at £3600 in the ship C, and it was made lawful for the ship to sail, to touch and stay at any ports whatsoever without prejudice to the insurance which was against the usual perils. The ship sailed from Bombay in ballast on 4th October 1866 for Howland's Island, intending to call at New Zealand for water. She got ashore on the coast of New Zealand on 25th December, and was so much damaged that plaintiff was obliged to abandon the voyage:

Held, that as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced, and that the plaintiff could recover the loss under the policy.

COCKBURN C.J.: "I am of opinion that this rule must be discharged. The first question is whether the assured can recover upon this policy for freight to be earned under a charter-party, by which the ship was to go from Bombay to Howland's Island, there take a cargo, and bring that cargo from Howland's Island to England; the facts being that the vessel, having started from Bombay upon the voyage, had been prevented by perils of the sea from ever reaching Howland's Island. I have no hesitation whatever in saying that in my opinion the insured can recover upon this policy. The authority referred to by my Brother Blackburn from Phillips on Insurance, s. 335, is directly in point, and I think, independently of authority, on principle it is clear that a party can recover upon a policy adapted to such a voyage. From the moment a vessel is chartered to go from port A to port B, and at port B to take a cargo and bring home that cargo to England or to take it to any port, which port I will call C, for freight, the shipowner having got such a contract has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the port at which the cargo is to be loaded, and from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge. It is therefore an appreciable, tangible interest, and I entertain no doubt it is an interest that can be insured. The only question here is, as it seems to me, whether under the particular circumstances and terms of this charter-party the policy would apply. . . . But here the policy being upon freight, to be earned by a voyage from Bombay to Howland's Island and from Howland's Island to England, we may take it that the shipowner had in view the voyage which the vessel actually entered upon and was intended to make, although he may have been at liberty under the conditions of the charter-party to go on some other voyage. . . . Although the plaintiff was at liberty by the charter-party to go to other places, and if he had gone to other places it might possibly have been that this policy would thereby have been vitiated by reason of the deviation, I do not think that argument can prevail when we find that the policy is in terms applicable to such a voyage as actually was entered upon."

A further point, as to whether she was not made fit to proceed through fault of the owner in not repairing, was decided against the defendant, the Court being of opinion that on a question of fact a jury would have found the vessel to be a constructive total loss.

Blackburn and Hannen JJ. delivered judgments to the same effect.

BARKER *v.* JANSON, 3 C.P. (1868), page 303:

Marine Insurance—Valued time policy—Estimated value—Mistake.

The value of the ship insured stated in a valued time policy is, in the absence of fraud, conclusive between the parties, however largely in excess of the true value.

A ship was insured by a valued time policy, and its value stated in the policy was £8000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the repairs would have exceeded its value when repaired. During the continuance of the risk the ship was totally lost. In an action against the underwriters :

Held, that the policy attached notwithstanding the previous injury to the ship, and that there being no fraud the value of the ship as stated in the policy was conclusive between the parties.

BOVILL C.J.: "The first question in this case we have already disposed of in the course of the argument. The second question would be one of considerable importance if it were still open for discussion. There is no doubt, however, now that the parties may use either an open or valued policy. In this case both parties have agreed upon a time policy (in which there is no warranty of seaworthiness), and have further agreed that whatever its condition may have been at the time the policy attached, they will treat the value of the vessel as of a certain amount; both parties acting in good faith are willing to be bound by that valuation. If such be the agreement of the parties, upon what principle would the Court be justified in setting it aside? An exorbitant valuation may be evidence of fraud, but when the transaction is *bona fide*, the valuation agreed upon is binding. I think, therefore, there should be no rule."

Willes, Keating, and Montague Smith JJ. delivered judgments to the same effect.

BLACKBURN *v.* HASLAM (1888)

Q.B.D. vol. xxi. page 144.

Concealment—Principal and agent.

The plaintiffs, underwriters at Glasgow, employed there a firm of insurance brokers to reinsure a ship which was overdue. The brokers received information tending to show that the ship, as was the fact, was lost. Without communicating this information to the plaintiffs, they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance premium which the plaintiffs were prepared to pay. Communications followed between the plaintiffs and the London agents, and the London agents, through a firm of London insurance brokers, effected a policy of reinsurance at a higher rate of premium, which policy was underwritten by the defendant :

Held, that the policy was void on the ground of concealment of material facts by the agents of the assured.

The jury had found that the insurance was effected through the agency of the Glasgow brokers, and a verdict was therefore given for the defendant.

The judgment of the Court (Pollock B. and Charles J.) was delivered (at page 149) by POLLOCK B. . . . "Starting with the telegram of May 1, 11.29 A.M., there can be no doubt, when that was sent, Messrs. R. M. & T. were agents for Messrs. B. L. & Co. to effect the insurance proposed thereby, and that any knowledge by them of facts material to the risk would be equivalent to a knowledge by their principals, and would vitiate any insurance based upon such proposal. Up to this time, however, both principals and agents were ignorant of any such facts. Before any further steps were taken R. M. & T. became aware of the reports brought by the *City of Rome*. They thereupon determined to go no further with the matter in their own names, but having received the intelligence in confidence they did not communicate it to Messrs. B. L. & Co. What they did was this: Having previously obtained the authority of B. L. & Co. to go as far as 20 gs., they telegraphed in B. L. & Co.'s own name to the London brokers, Messrs. R. T. Y. & Co., who answered direct to B. L. & Co. that there was no chance under 25 gs.; upon which B. L. & Co. telegraphed back to R. T. Y. & Co., 'pay 25 gs.', and upon this the policy in question was effected by the London brokers R. T. Y. & Co., through the agency of another firm of brokers.

"Under these circumstances it is clear that up to the time when Messrs. R. M. & T. received the last telegram addressed to themselves, they were the agents for the plaintiffs to effect not merely a reinsurance but the particular reinsurance which the plaintiffs had ordered, viz. upon the ship *State of Florida* for £1500, and that any knowledge possessed by them which was material to the risk would be equivalent to a knowledge by the plaintiffs themselves. It seems to be equally clear that the agents being incapacitated from continuing the negotiation in the sense that no valid policy could be founded on it, they could not put themselves in a better position by telegraphing in the name of their principals instead of their own name. They having so telegraphed, and the answer having been sent to the principals, what is the position of the latter?

"That they might have effected a valid policy by a fresh and independent negotiation carried on through another agent is established by the decision of the House of Lords in *Blackburn, Low & Co. v. Vigors*, and for the purpose of this case it may be further conceded that the principals might themselves have opened a new and independent negotiation with the brokers in London by giving a fresh order for the policy. This, however, was not done. Messrs. B. L. & Co. merely telegraphed to R. T. Y. & Co., 'State of Florida, if you cannot do better pay 25 gs.', and upon the basis of this telegram the negotiation continues. The offer is put forward at the increased premium; this is accepted, and the policy in question is signed.

"Upon this state of facts the question arises, Was the original negotiation given up and a new and distinct negotiation entered upon, or was it a mere handing over by the agents to their principals of an existing negotiation, in order that the principals might take it up at the point where the agents left off and continue it until it resulted in a contract? This is practically the question which was left by Day J. to the jury, and they have found that the latter is the true view of what occurred.

"In considering their finding it is important to remember that the only instructions as to the name of the ship and the amount to be insured were those contained in the first telegram from the Glasgow agents to the London agents. Without these no proposal could have been forwarded. They were never mentioned again by the plaintiffs, and the effect is the same as if each telegram had reiterated all that had gone before. This also affords an answer to one of the arguments pressed on behalf of the plaintiffs. A merchant, it was said, who sends his agent into the market on Monday with a limited authority as to price is not prohibited from going into the same market on Tuesday and bidding higher by reason of his agent having some information, such as that the goods were stolen, which would prevent any bargain which he might make resulting in a valid contract. But the reason of this is that the principal in the supposed case only employed the agent *pro hac vice* on Monday, and when he himself went into the market on Tuesday he commenced independent operations in no way based upon the earlier exertions of his agent. In the present case the name of the vessel, the amount to be insured, and the whole object of the bargaining were the same, and the only change was in the advanced premium, so that the plaintiffs not merely continued a negotiation begun by their agents, but they availed themselves of it by using and adopting what they had done up to a certain point. It is truly said, no doubt, that when once the agents ceased to negotiate their authority was at an end, but this leaves untouched the position that the negotiation was handed over to the principals to complete, and that the London brokers were entitled to treat the matter as one entire transaction.

"It was also urged that the negotiation was not vitiated by the fact that the principals made use of the information as to the name of the ship and the amount of the policy, as this was done merely by way of reference. Had there been no question of agency this would be true. If all the plaintiffs had done had been to telegraph to the London agents 'effect for me the same insurance you have effected for A.B.,' with whom the plaintiffs had had no dealings, the reference to A.B. would not vitiate the ultimate policy because A.B. had improperly withheld information which he ought to have communicated. The distinction, however, between this and adopting the previous acts of an agent and carrying out a contract in part based upon them is obvious. . . ." (At page 153.) "If the view which we have taken of the facts and the law which arises out of them be the true views, this judgment in no way conflicts with the decision in *Blackburn, Low & Co. v. Vigors*. Although the opinion expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, we take that opinion as applying to the particular facts before the House, which showed that, before the negotiation for the policy sued upon had commenced, all connection of the plaintiff with his former brokers had ceased, and we cannot suppose it would be intended to apply to the facts proved in the present case, which showed that so far from the connection between the principals and their agents ceasing, the brokers used the name of the principals to continue the negotiations, and the principals adopted the act and themselves continued and carried out what their brokers had commenced."

BLACKBURN *v.* VIGORS (1887)

APPEAL CASES, vol. xii. page 531.

Concealment—Principal and agent—Concealment by agent through whom policy not effected.

Plaintiffs instructed a broker to reinsure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a reinsurance for £800 through the broker's London agents. Afterwards the plaintiffs effected a reinsurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to reinsure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith :

Held, reversing the judgment of the Court of Appeal and restoring that of Day J., that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700.

LORD HALSBURY L.C. : at page 535: ". . . The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact, the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent who did not effect the policy at an earlier period received information, admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs which he did not communicate.

" So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which I think it is inapplicable. Lindley L.J. says, I think, correctly: ' It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him or to the underwriter for him.' And Lopes L.J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent to obtain the insurance as if he had acquired it himself. To the propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment, ' agent employed to obtain the insurance,' or in the other judgment the words ' the underwriter,' import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents, of certain facts then known to the plaintiffs or their agents and unknown to the defendant, and which were material to the risk."

His Lordship, after referring to the judgment of Lord Ellenborough in *Gladstone v. King*, proceeded (at page 536):

" I can quite understand that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot

escape the necessity of being acquainted with the ship and its history because he has committed to others—his captain or his general agent for the management of his shipping business—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

“With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn C.J. in *Proudfoot v. Montefiore*. A part of the proposition is ‘that the assurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge.’

“I think these last are the cardinal words and contemplate such an agency as I have described above. I am unable, however, to see that the present case is governed by any such principle.

“A broker is employed to effect a particular insurance. While so employed, he receives material information—he does not effect the insurance and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know,¹ his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker, through whom the policy sued on was effected, were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word ‘agent’ leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent’s knowledge and intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received. . . .

“Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct, but it is obvious that that formula can only be applied when the words agent and principal are limited in their application.

“To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word ‘agent’ that plausibility is given to reasoning which requires the assumption of some such proposition.

“What then is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

“He certainly is not employed to acquire such knowledge, nor can

¹ *Sic: quaere*, “when an agent is the person to know.”

any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship or the owner himself as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

"For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed and the judgment of Day J. restored, and I move your Lordships accordingly."

Lords Watson, Fitzgerald, and Macnaghten delivered judgments to the same effect.

THE "BRIGELLA" (1893) (TEMPERLEY *v.* MACKINNON)

PROBATE DIVISION, page 189.

General Average—Chartered Freight—Foreign Statement.

The plaintiffs, who were owners of a vessel chartered to proceed to a port in the United States, as ordered at port of call, and there load a cargo for the United Kingdom or Continent, and deliver the same on being paid the agreed freight, effected with the defendant an insurance on "chartered homeward freight," the voyage being described in the policy as from Liverpool to Delaware Breakwater, and thence to New York or one other named port, and thence to any port in the United Kingdom or Continent within named limits, and general average was to be payable "as per foreign statement if required."

The plaintiffs' vessel left Liverpool in ballast under the above charter, and two days afterwards, in consequence of heavy weather causing her tanks to leak, put into Holyhead without incurring expense in so doing; but at that place some expense was incurred, and, three days later, she returned to Liverpool, where further expenses were incurred in repairs, but none of the items of expenditure at Holyhead or Liverpool were incurred for the preservation of ship and freight. The vessel then sailed for Delaware Breakwater, where she received orders for Baltimore, to which port she proceeded, and there loaded, under the charter, a cargo which she delivered at Barrow. By an average statement prepared in London, according to the alleged provisions of American law, general average charges in respect of the expenses incurred in Holyhead and Liverpool were shown amounting to £186 : 6 : 5, including a sum of £154 : 3 : 8 for wages and victualling of the crew whilst the vessel was at Holyhead and Liverpool. By the statement, the ship was made to bear

£164 : 9 : 10 of these charges, and the chartered freight (valued for the purposes of contribution at £1526) was made to bear £21 : 16 : 7. In respect of the defendant's proportion (£11 : 16 : 4) of this latter sum, the plaintiffs brought their action, alleging that a general average loss had arisen, which had been properly adjusted according to American law, and that the plaintiffs must be treated as having contributed to the loss on the basis of the statement:

Held, that, as the ship was under charter outward bound in ballast to load for the return voyage, and the only persons interested in the ship and chartered freight were the shipowners, the expenses in question were not a general average loss for which the defendant could be liable under the policy on chartered homeward freight, and, as there was no necessity for any foreign adjustment, the "foreign statement" clause had no effect.

The policy contained the usual suing and labouring clause, and provided that general average and salvage charges should be payable "as per foreign statement, if required, or per York-Antwerp Rules if in accordance with the contract of affreightment," but the charter-party did not refer to these rules.

GORELL BARNES J. (having stated the nature of the case, the facts, the contents of the charter-party and policy, and the items charged to general average) continued (at page 193): "The vessel appears to have been taken to a place of safety in the port of Holyhead without incurring any expense in so doing, and it will be seen that none of the items of expenditure at Holyhead or Liverpool appear to have been incurred for the preservation of the ship and freight; they all relate to matters occurring after the risk to the vessel had ceased, and to have been incurred to repair the vessel or owing to the delay during repairs. It was practically conceded in argument that they were not of the nature of general average sacrifice or expenditure, according to English law, and the vessel having put into port to repair particular average loss only, it was not contended that according to that law the wages and provisions of the crew at Liverpool would be treated as general average loss, or be in any way borne by the underwriters. . . . In the course of their arguments, counsel referred to a number of cases and passages from text-writers; but when they are examined there is, with two exceptions, not much to be found in them bearing directly upon the real question in this case, and in order to arrive at a decision thereon, it is necessary to consider the principles to be applied in solving it, and several important cases besides those referred to in argument, which indirectly assist in doing so.

"I understand the plaintiffs' points to be intended to establish that a general average loss has arisen; that it has been properly adjusted according to American law, by a statement which satisfies the term a 'foreign statement' in the policy; and that the plaintiffs must be treated as having contributed to the loss, on the basis of that statement.

"Some of the authorities cited bear upon the general question of the liability of chartered freight to contribute in general average where there are really different contributory interests in respect of ship and cargo; but it is unnecessary, in my opinion, to embark upon this general question.

"The real question in the case is whether or not where a ship is proceeding in ballast to her loading port under or in pursuance of her charter, and the only persons interested in the ship and chartered

freight are the shipowners, there can be any general average loss for which the underwriters are liable under a policy on chartered freight containing the 'foreign statement' clause. I will first consider the matter apart from that clause.

"Numerous definitions of a general average loss have been given; but I need only refer to that of Lawrence J. in his often-quoted judgment in *Birkley v. Presgrave*, where he says, 'All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested.' See also the judgments in *Svendsen v. Wallace*.

"There is involved in this statement the loss sustained by one or some for the benefit of all and the liability of all to contribute thereto.

"This liability to contribute is as old as the Rhodian law, the text of which, as given in the Digest of Justinian, is so well known."

The learned judge then referred to the following judgments respecting the liability to contribute:

Lord Tenterden (then Abbott C.J.) in *Simmonds v. White*; Bramwell L.J. in *Wright v. Marwood*; the Master of the Rolls (Lord Esher) in *Burton v. English*; Bowen L.J. in *Burton v. English*, and continued:

(At page 195) "Whichever way it is looked at, the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not. The circumstance of a party being insured can have no influence upon the adjustment of general average, the rules of which, as I have in effect shown above, are entirely independent of insurance.

"If a contributing party is insured he can claim an indemnity against his underwriter in respect of the contribution which he has been compelled to pay in general average, but that is all. I do not forget that in some cases an assured may have a right to recover in full for the loss of sacrificed property, but the underwriters have the right to recover contribution from the various contributories, and, subject to certain differences of values, the result to the underwriters should be practically the same as if the assured had only claimed his contribution from them—see *Dickenson v. Jardine*—and this exception does not affect the question I am considering. The contribution is based on the benefit derived from the sacrifice by each interest—in other words, on the values saved, and in the case of freight, this is the amount of freight at risk, minus the expenses of earning it, which would have been saved if the ship had been lost.

"This net amount of freight is not the amount of freight which the underwriters on freight would have to pay if the ship had been lost, because they would have to pay the gross amount insured without deducting any cost of earning it, which would have been saved if the ship had been lost.

"Now, the interests at risk in the present case are the ship and the chartered freight, and these interests belong to the plaintiffs. All that is said in the cases I have referred to, and that I have said about general average and contribution, seems utterly inapplicable to such a case. There is no contract to contribute nor any law of the sea affecting the matter. If the plaintiffs were not insured, they would simply bear their own loss. No adjustment would be required, nor would any question of contribution arise, and there would be no general average, properly speaking. If, however, the plaintiffs had

insured all their interests in one policy, expenses properly incurred in averting a loss of those interests imperilled by a peril insured against would fall to be borne by the underwriters under the sue and labour clause.

"If they had insured the ship in one policy and the freight in another, it follows that the underwriters on the respective policies should bear expenses of averting a loss of those interests in proportion, not to the actual values saved, but to the benefits derived by the underwriters from the averting of the loss—that is to say, in proportion to the amounts insured by them respectively (see Benecke on Marine Insurance, pp. 322 and 323).

"I have already pointed out that in the present case there were no expenses incurred to avert a loss of the joint interests, but only certain expenses incurred in order to repair the ship or owing to the delay in effecting those repairs. There was no general average loss, or even any loss or expenditure common to both interests. There was no necessity for any general average adjustment, and no question as to any place of adjustment.

"The plaintiffs' propositions involve the suggestion that when one person only is interested in the subject-matters at risk and insures them separately, the underwriters on each interest separately insured must be considered as consenting to deal with the assured as if the other interests belonged to different persons. But I can see no foundation for this in an ordinary policy such as that before me, or in fact. It is inconsistent with the notion of a contract of indemnity, and with the principles which I have considered above. The plaintiffs, however, supported this suggestion by referring to two cases—*Moran v. Jones* and *Oppenheim v. Fry*.

"The actual decision in *Moran v. Jones* (which case has since been commented on) was that the expenses there in question were general average, to which ship, freight, and cargo were to contribute. There are some expressions in Lord Campbell's judgment from which it might be inferred that he thought that where there was no cargo on board, and the ship and freight belonged to the same person, there might be a general average loss, but I doubt whether he really meant to say more than that the underwriters on ship and freight would have to contribute to a sacrifice incurred to avert a total loss of ship and freight in proportion to the benefit they derived from the sacrifice.

"In *Oppenheim v. Fry* there was a policy on a steamer, the hull and machinery being separately valued, with a clause, 'Average payable on the whole or on each as if separately insured.' The steamer had discharged her cargo at Constantinople, and while she lay there, without any cargo on board, her hull was damaged by fire, but not her machinery. The cost of the repairs did not amount to 3 per cent on the insured value of the hull, but an additional sum of £55 : 5 : 10 was expended in extinguishing the fire to preserve the hull from total destruction. It was proposed to add the whole of this to the cost of repairs so as to take the case out of the common 3 per cent memorandum. The action was for a particular average loss on hull, and the decision was that, however the expenses were considered, the plaintiffs could not add the whole of them to the cost of repairs to make up a sum exceeding 3 per cent of the insured value of hull, but that they must be apportioned between the hull and the machinery. All that was held in both Courts was that the expenses ought to be apportioned partly to the hull and partly to the

machinery ; and as when this was done the cost of repairs, plus the portion of the said expenses apportioned to hull, did not come to 3 per cent on the insured value of the hull, the verdict for the defendant was allowed to stand. The judges in the Queen's Bench considered it not necessary to decide whether the expenses, amounting to £55 : 5 : 10, were general average ; and in the Exchequer Chamber no reference to general average appears in the judgment. Moreover, I do not find that the attention of the Courts was directed to the sue and labour clause.

"The judgment of Lord (then Mr. Justice) Blackburn was especially referred to by the plaintiffs' counsel ; but the learned judge said it was not necessary for the decision of the case to say whether the expenditure was general average or not, and in the rest of his remarks I do not think the distinction between general average, properly speaking, and an apportionment of expenses on the insured values as between an assured who had all the interests and who insured them separately and his different underwriters, was presented to the learned judge's mind, nor is the sue and labour clause referred to by him. The case was an attempt to treat the whole expense of saving both interests from loss, as particular average on one alone, namely, the ship, whereas the expenses were sue and labour charges properly apportionable as between the shipowners and their underwriters over the interests benefited (see *Kidston v. Empire Marine Insurance Co.*.)"

The learned judge then referred to the judgment of Story J. in the American case of *Potter v. Ocean Insurance Co.*, and continued :

(At page 199) "These expenses, for the reasons I have given above, are not, in my opinion, general average ; but the underwriters on ship may be made liable for such of them as are incurred to avert loss on the grounds I have before stated. Unless, therefore, the clause, 'General Average, payable as per foreign statement if required,' alters the case, there was no loss on the freight policy.

"The object of this clause was fully considered in *Harris v. Scaramanga*, where it was held upon a policy on goods which contained the clause, 'To pay general average as per foreign statement if so made up,' that English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made, and that they are so bound although the contributions are apportioned between the different interests in a manner different from the English mode, or although matters are brought into, or omitted from, general average which would not be so treated in England. The present Master of the Rolls in the course of his judgment refers to the diversities which may arise if this clause be not inserted, as pointed out in 2 Phillips on Insurance, s. 1414, and says : 'It seems to me that the only way to give effect to the marginal provision in this case, and an effect as against the underwriter who has by it taken upon himself some real substantial obligation different from his ordinary obligation, is to say that it was intended to meet this recognised diversity and to oblige the underwriter to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution.'

"This clause, then, makes the underwriter liable to pay on the same basis as that on which the contributors have been compelled to pay under an adjustment made up at a foreign port in accordance

with the law of that port, and the statement referred to in the clause is a foreign statement which has been necessarily and properly prepared in order to adjust the rights and liabilities of contributories—that is, the amounts to be contributed by the various parties interested in an adventure for the purpose of enabling those parties to settle with each other at the foreign port at which the adjustment should be made, although possibly it is immaterial whether that statement is in fact made up by an adjuster residing at the foreign port or in England, provided it is in accordance with the law of the foreign port, where the adjustment ought, according to the circumstances of the case, to be made.

“ But in my opinion the clause has no relation to a case like the present, where there has been no necessity for any foreign adjustment nor any compulsion to pay general average according to foreign law, nor any contribution, in fact, in general average.

“ The statement before me was merely prepared in order that the plaintiffs might claim upon their underwriters, and it is not based upon the true benefit derived by the underwriters from the alleged losses, for it is based on actual values and not on insured values. It is based on a supposed contribution, which has no foundation in fact, and which the plaintiffs' counsel admitted was a fiction.

“ Adjustments are made at the port of destination or where the voyage is broken up, because of the necessity for an adjustment at the place where the interests separate, and at a time when the master can compel the contributories to pay or secure the amounts to be contributed before he parts with the goods and gives up his lien upon them.

“ There is no reason in principle, nor of necessity, nor even of convenience, why the claim on the underwriters in this case should be made up upon an American rather than upon an English basis.

“ The claim is in respect of expenditure made in England, and not in respect of any sacrifice of subject-matters of insurance. The reason why the plaintiffs prefer the American basis is, that if it can be supported they will recover from their underwriters for the wages and provisions of the crew, which it was admitted would not be allowed in this case in England.

“ I notice that the statement is only ‘alleged’ to be made up according to American law, and after referring to the American works on general average, I doubt whether, according to that law, the expenses in question would in the present case be adjusted as a general average loss. I think the admission in this case means little, if anything, more than that according to American law wages and provisions of the crew from the time a vessel bears away for a port of repairs are allowed in general average, provided that it is necessary for the safety of the ship, cargo, and freight alike that the repairs should be made, whether the injury which created the necessity for them was itself caused by a general average act, or by a peril excepted in the contract of carriage.

“ I am therefore of opinion that the plaintiffs' claim fails and that the defendant is entitled to judgment with costs.”

BURNAND *v.* RODOCANACHI (1882)

HOUSE OF LORDS. 7 APPEAL CASES, page 333.

Marine Insurance—Valued policy—Loss—Salvage—Indemnity.

Respondents effected valued policies of insurance (including war risk) on a cargo which was afterwards destroyed by the *Alabama*, a Confederate cruiser, and the underwriters paid as on an actual total loss the valued amounts which were less than the real value. The United States, out of a Compensation Fund created after the loss and distributed under an Act of Congress passed subsequently to the loss, paid to the respondents the difference between their real total loss and the sum received from the underwriters. Under the Act of Congress no claim was allowed for any loss for which the party injured should have received compensation from any insurer, but if such compensation should not have been equal to the loss actually suffered, allowance might be made for the difference; and no claim was allowed by, or on behalf of, any insurer either in his own right or in that of the party insured:

Held, affirming the decision of the Court of Appeal, that the underwriters were not entitled to recover the compensation from the respondents.

LORD BLACKBURN: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss, reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has already paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back. The first question is this. There had been a policy of insurance and a total loss by capture and destruction of the property insured and a payment of the full value insured—a payment of the total loss under the policy. Subsequently to that payment there came the Treaty of Washington, and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy, and the question I apprehend comes to be, Was that sum, or was it not, paid so as to be a reduction or diminution of the loss?

"The cases which have been cited, *Randall v. Cockran* and *Blaauwpoet v. Da Costa*, bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming into the hands of the English Government; and the King was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures. It was certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the sufferers. But then, I think, that that gift being made, as it was made, for the benefit of those who had suffered from the captures and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the King was bound to pay the money—he was not; it was not because there was a moral obligation to pay it . . . ; it was

because *de facto* there was a payment which prevented or diminished *pro tanto* the loss against which the insurers were bound to indemnify the assured. . . .

"In the present case the Government of the United States did not pay it with the intention of reducing the loss. . . . Bramwell L.J. in his judgment has used the phrase, 'It was not given as salvage.' I should myself prefer to use my own phrase expressing the same idea, and to say that it was not paid in such a manner as to reduce the loss against which the plaintiffs had to indemnify the defendants; it is the same thing, but rather differently expressed.

"That, I think, would dispose of the case if it were not for a point urged, that because this was a valued policy of insurance, the value being put at £15,000, the defendants could never under any circumstances as against the plaintiffs set up the fact, which is a fact, that the value of the property exceeded £15,000. Upon the statement of that point it looks so artificial when applied to these facts that one might almost rest there and say, 'It cannot be.' I think it is plain that the reasons for which the value has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether the principle was rightly applied in the case of the *North of England Insurance Association v. Armstrong* it is not necessary now to say. I own if I had a similar case to decide sitting in the Court of Error, I should pause before I said that it was rightly decided, but whether that decision was right or wrong it is not at all necessary to consider here. It is plain to my mind that the valuation being only for the purpose of the policy of insurance and for the purpose of binding the defendants to admit it in favour of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had contracted to indemnify them. The circumstance that by agreement between the parties the amount they had contracted to pay was not to exceed £15,000, appears to me quite immaterial.

"For these reasons I agree that the judgment as it stands is right, and ought to be affirmed."

Lord Selborne L.C., Lords Watson and Fitzgerald also delivered judgments to the same effect.

CARTER *v.* BOEHM (1765)
 BURROWS' REPORTS, vol. iii. page 1905.
Insurance—Disclosure—Concealment.

An action on a policy of insurance for twelve months, from October 16, 1759, against the loss of Fort Marlborough in the East Indies by its being taken by a foreign enemy. The event happened, the fort being taken within the year.

Judgment was obtained against the underwriter, who thereupon applied for a new trial on the ground of concealment when the insurance was effected.

LORD MANSFIELD, in refusing the application, stated, in the course of his judgment:

(At page 1909) "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only;

the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into the belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

“The keeping back such circumstance is fraud, and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived, and the policy is void ; because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

“The policy would equally be void against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to be arrived ; and an action would lie to recover the premium.

“The governing principle is applicable to all contracts and dealings.

“Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and his believing the contrary.

“But either party may be innocently silent as to grounds open to both to exercise their judgment upon.

“This definition of concealment, restrained to the efficient motives and precise object of any contract, will certainly hold to make it void in favour of the party misled by his ignorance of the thing concealed.

“There are many matters as to which the assured may be innocently silent. He need not mention what the underwriter knows.

“An underwriter cannot insist that the policy is void because the assured did not tell him what he actually knew, what way soever he came to the knowledge.

“The insured need not mention what the underwriter ought to know ; what he takes upon himself the knowledge of, or what he waives being informed of.

“The underwriter needs not to be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation ; as, for instance : The underwriter is bound to know every cause which may occasion natural perils ; as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils ; from the rupture of states from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace ; from the imbecility of the enemy, through the weakness of their counsels or their want of strength, etc.

“If an underwriter insures private ships of war, by sea or on shore, from port to ports, and places to places anywhere, he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view, and, from the nature of his contract without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two ; or if he insures a voyage with liberty of deviation, he needs not be told what tends to show there will be no deviation.

“Men argue differently from natural phenomena and political appearances ; they have different capacities, different degrees of knowledge, different intelligence. But the means of information and judging are open to both ; each professes to act from his own

skill and sagacity; and therefore neither needs to communicate to the other.

"The reason of the rule which obliges parties to disclose, is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract which one privately knows and the other is ignorant of and has no reason to suspect.

"The question, therefore, must always be whether there was, under all the circumstances at the time the policy was underwritten, a fair representation; or a concealment, fraudulent if designed, varying materially the object of the policy and changing the risk understood to be run."

After reviewing the evidence, Lord Mansfield refused the application for a new trial.

CASTELLAIN *v.* PRESTON (1883)

COURT OF APPEAL, 11 Q.B.D., page 380.

Insurance (Fire)—Contract of indemnity—Vendor and purchaser—Insurance by vendor—Fire after contract for sale but before completion—Right to insurance moneys—Subrogation.

According to the doctrine of subrogation, as between the insurer and assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been, diminished.

A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the Company. The purchase was afterwards completed and the purchase money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor:

Held, in an action by the Company against the vendor, that the Company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit.

BRETT L.J. (at page 386): "The very foundation, in my opinion, of every rule which has been applied to marine insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified. That is a fundamental principle of insurance. . . . I have mentioned the doctrine of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour

of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity, it has been adopted solely for that reason. . . . But, it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is whether that doctrine as applied to insurance law can in any way be limited. . . . In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent . . . that as between the underwriter and the assured the underwriter is entitled to every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been, diminished. . . . But it will be observed that I use the words 'every right of the assured.' I think that the rule does require that limit. In *Burnand v. Rodocanachi* the foundation of the judgment, to my mind, was that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English Government by a way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own Government to himself, but it was always deemed to be capable of being brought within the range of insurance law, because the English Government invariably made the 'gift,' so invariably, that as a matter of business it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shows that, in my opinion, it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because, if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner, if upon the happening of a tort the tort is immediately made good by the tortfeasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did, for a moment, exist a right of action in favour of the assured, into which the insurer could be subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has thereby been diminished, then, although there never was and never could be any right of action into which the insurer could be sub-

rogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and insurer by reason of the satisfaction of that right. . . . There was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage, therefore, of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right, which at one time was merely in contract, but which was afterwards fulfilled . . . does affect the loss ; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money they would have got if the loss had not happened."

(At page 392) ". . . The contract in the present case, as it seems to me, does enable the assured to be put by a third party into as good a position as if the fire had not happened and that result arises from the contract alone. Therefore, according to the true principle of insurance law and in order to carry out the fundamental doctrine, namely that the assured can recover a full indemnity but shall never recover more, except, perhaps, in the case of the suing and labouring clause in certain circumstances, it is necessary that the plaintiff should succeed."

Cotton and Bowen L.JJ. delivered judgments to the same effect.

CHINA TRADERS' INSURANCE COMPANY *v.* ROYAL EXCHANGE (1898)

COURT OF APPEAL, 2 Q.B., page 187.

Insurance, Marine—Practice—Action by underwriters against reinsurer—Delivery of ship's papers.

In an action by an underwriter on a policy of Marine Insurance, brought by him against a reinsurer, the latter is entitled to discovery of ship's papers.

An appeal from the judgment of Mathew J., refusing delivery of ship's papers in reinsurance cases.

A. L. SMITH L.J. (at page 190): "The question is, whether the old practice in cases of marine insurance, that the underwriter is entitled to get from the assured all the documents which he has under an order for ship's papers, applies to a case of reinsurance. This action is on a policy of marine insurance, and the only difference between the original insurance and the present case is that the original underwriter has reinsured part of that which he insured under the original policy.

"Now as soon as Mathew J. decided, as he did in *Chippendale v. Hall*, that the reinsurer when sued by the underwriter had precisely the same defences as the underwriter had in an action against him by the original assured, on what principle can it be said he is not entitled to the same discovery as the original underwriter had when the original assured sued him ? If the reinsurer could not raise the defences of unseaworthiness, deviation, or any such like defences as the original underwriter had, the case would be different ; but when once it is settled that the reinsurer has open to him all the

defences which the original underwriter had, I cannot see on principle why he is not entitled to the documents which may tend to fortify these defences. It is said that it is inconvenient, and that the reinsuring underwriter will have no documents; but the same thing might be said as between the assured and the underwriter upon goods, and it is conceded that the old rule applies to insurance on goods just as it does to insurance on ship. If the plaintiff in the action has not got and cannot get the papers, and does not know where they are, he must say so. It is said there may be reinsurance two or three times; but when any reinsurer is sued by the next preceding reinsurer, and is put under an order for ship's papers, he can say that he has not got them, and cannot get them, and the stay will be taken off.

"The case of *Henderson v. Underwriting and Agency Association* has been cited; but it is obviously distinguishable, for it arose on a policy covering loss of goods by land. What Cave J. there said was that he would not apply the rule as to ship's papers in cases arising on policies of marine insurance to policies covering land transit also.

"For these reasons I think the appeal should be allowed."

Chitty and Vaughan Williams L.J.J. delivered judgments to the same effect.

THE "COPERNICUS" (1896)

PROBATE DIVISION, page 237, COURT OF APPEAL.

By a policy on freight, "at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" the freight was to be covered "from the time of the engagement of the goods."

Goods were engaged for the vessel which was to earn the freight, and were ready for shipment in her at the time of her loss, which occurred before she arrived at her first loading port on the west coast of South America:

Held, by the Court of Appeal (Lord Esher M.R., Kay and A. L. Smith L.J.J.), affirming the decision of Gorell Barnes J., that the "engagement" clause must be construed with reference to the voyage described in the policy, and, therefore, as the vessel had not arrived at her first loading port on the west coast of South America, the risk had not attached.

By two policies of marine insurance each covering £50,000 and dated respectively 1st March and 28th November 1895 (the latter policy being expressed to follow and succeed the former), the plaintiffs were insured by the defendant and other underwriters "on freight and/or charges as interest may appear" by "steamer and/or steamers belonging to, chartered by, or managed by," the plaintiffs, "lost or not lost at and from any port or ports of loading on the west coast of South America to any port or ports of discharge in the United Kingdom" or in certain other countries as therein described, the policies "to cover freight from the time of engagement of the goods or after a shipping order has been issued by the agent or his broker."

In September 1895 offers of cargo were received from the plaintiff's agents at Valparaiso for a voyage to the United Kingdom from ports on the west coast of South America, and for the purpose of loading this cargo the *Copernicus* on 8th October left Monte Video for

Valparaiso, calling at Punta Arenas in the Straits of Magellan, where she discharged and loaded a small quantity of coasting cargo, but since she left that place on 16th October she had not been heard of. When the *Copernicus* sailed from Punta Arenas there was cargo engaged for her at Valparaiso ready for shipment in her there, and cargo was also engaged for her at other ports on the west coast, the freight upon which would have amounted to £4900.

On 17th December 1895 the plaintiffs declared this amount upon the policies, namely £3700 on the first (which exhausted that policy), and £1200 on the second policy; but the defendant . . . refused to accept the declaration; the plaintiffs thereupon sued for his proportion of the alleged total loss of freight.

LORD ESHER M.R. (at page 239): "This is a question of insurance on freight. No doubt, as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insurable interest; but during the argument I had doubts whether the shipowners, who are the plaintiffs in this case, were in that position. However, the case has been fought in the Court below, and argued here on the assumption that they had an insurable interest and therefore I shall take that to be so.

"Now, the shipowner had insured his freight against loss; but when, how, or where? He had insured it against loss in particular places and for a particular time. He might have insured it against loss on the voyage from London to Valparaiso and back to London. If he had had a charter party at the beginning of the time which would give him freight on goods to be put on board his ship at Valparaiso, that would include into the time during which the loss might occur the time from London to Valparaiso, and if the ship was lost on the voyage out, he would lose that freight from Valparaiso home by reason of the ship having been lost on the voyage out, and, therefore, he might insure it. But it is necessary to determine the period of time and the locality in which the risk or the loss is to occur. How is that done? By fixing the time when and the place where the risk of loss is to begin, and the time when and the place where it is to end. The fixing of the time when and the place where it is to begin is determined by the words 'at and from.' In this case it is not at and from London to Valparaiso and back to London. It is at and from Valparaiso. Therefore the loss must occur, if it is to be a loss, under the policy at Valparaiso or on the voyage from Valparaiso to London. This loss did not occur within that time or within that space at all. It occurred before that time began, that is, before the ship reached Valparaiso. It is a loss which has occurred before the risk which is insured against can possibly attach. Under these circumstances the policy never did attach, and the decision of the learned judge in the Court below was right."

Kay and A. L. Smith L.JJ. delivered judgments to the same effect.

CORY v. BURR (1883)

HOUSE OF LORDS, 8 APPEAL CASES, page 393.

Insurance, Marine—Policy—Barratry—Warranted free from capture and seizure.

In a time policy of marine insurance on ship the ordinary perils insured against (including barratry of the Master) were enumerated,

and the ship was warranted "free from capture and seizure and the consequences of any attempt thereat." In consequence of the barratrous act of the Master in smuggling, the ship was seized by Spanish Revenue officers and proceedings were taken to procure her condemnation and confiscation. In an action on the policy to recover expenses incurred by the owner in obtaining her release:

Held, affirming the decision of the Court of Appeal, that the loss must be imputed to capture and seizure and not to the barratry of the Master, and that the underwriters were not liable.

EARL OF SELBORNE L.C. (at page 395): "What is the meaning of the words capture and seizure? Warranted free, clearly means that the insurers are not to be liable for the things to which the warranty applies. I own I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view . . . that capture and seizure in such a warranty must be taken to mean *prima facie* belligerent capture and seizure only. . . . I am disposed to agree that if the word 'capture' had stood alone it might have appeared to point to belligerent capture, but the addition of the word 'seizure' is only officious as I read the warranty, by supposing it is to exclude that narrow construction of the word capture, and to let in other seizures, such as Cotton L.J. suggests, by means of the revenue laws of a foreign state.

"The facts of this case show what the nature and effect of such a seizure is. The ship was seized in every sense we can put upon the word seize. It was taken forcible possession of, and that not for a temporary purpose, not an incident to a civil remedy or the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship. And the case states that would have been the result of the seizure which took place in the present instance, if money had not been paid to release the ship from that confiscation and total loss. To my mind, those facts are properly described by the word seizure in its natural sense, and unless there is something else in the policy to show that the word was meant to have a different sense, not inclusive of such a state of facts, I should have said, in the absence of authority, that they were included."

(After referring to *Kleinwort v. Shepherd* and *Powell v. Hyde*, as authorities showing that the words of the warranty could not be restricted to belligerent capture, the judgment proceeds:)

"Therefore both on authority and principle I reject the idea that these words capture and seizure can be so narrowly construed as to exclude such a seizure as that which took place in the present case."

(At page 397) "But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made on the footing of barratry then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty taken together, without leading to consequences altogether destructive of the whole operation of the warranty. . . .

"It is quite manifest that the object of this warranty is, and must be, to except such losses otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are occasioned by capture and seizure. That appears to be equally

the case whether remotely it was occasioned by barratry or not; in fact, the remoter it is the stronger the argument that it must be the case as to barratry."

Lords Blackburn, Bramwell, and Fitzgerald delivered judgments to the same effect.

CULLEN *v.* BUTLER (1816)

MAULE AND SELWYN, vol. v. page 461.

Assumpsit on a policy of Insurance for £200 upon goods on board the ship *Industry*, at and from London to the Canary Islands, the interest being averred in the plaintiff. The plaintiff declared in the first count, upon a loss by the perils and misfortunes of the seas; and in the second count, he averred, that the ship, with the goods on board, departed and set sail from London in prosecution of her intended voyage, and before her arrival at the Canary Islands, to wit, on 7th July, in the night of that day, the Master and crew of a certain British ship, called the *Midas*, believing the ship insured to be an enemy's ship, and that the persons on board thereof were then and there in a hostile manner about to attack the *Midas*, and attempt to board and take her as prize, did then and there for the purpose of defending themselves and the *Midas* against such apprehended attack, but without any fault committed or done by the Master or crew of the ship in the policy mentioned, fire at and against, and strike and pierce with shot the ship in the policy mentioned, whereby the said ship with the goods on board was sunk in the sea and lost.

At the trial the jury found that the ship and cargo were lost in the manner and under the circumstances stated in the second count, and found a general verdict for the whole subscription subject to the opinion of the Court upon a case stating the above facts. The question was, whether the loss was covered by the policy under the words "perils of the seas," or under the general words "all other perils, losses, etc."

The opinion of the Court, consisting of Lord Ellenborough C.J., Bayley and Abbott J.J., was delivered by LORD ELLENBOROUGH:

(At page 464) "As the Court is of opinion, that the plaintiff is entitled to recover upon the second count of this declaration, framed upon the special circumstances of this case, which clearly seem to fall within the general and comprehensive words in the policy subjoined to the particular causes of loss therein specified, namely: 'all other perils, losses and misfortunes which had or should come to the hurt, detriment, and damage of the said goods and merchandises and ship, etc., or any part thereof,' it becomes less material to consider whether the plaintiff would be entitled to recover as for a loss 'by perils of the sea' in the proper and strict sense of the words, *i.e.* 'ex marinae tempestatis discrimin'e, as described by Emerigon, which loss by perils of the sea is the specific loss stated in the first count. If it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are upon that ground equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss than a loss by perils of the sea. But as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general

and sweeping words as they are called, in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added, in order to extend the responsibility of the underwriters unequivocally to other risks not included within the scope of any of those enumerated perils, I shall think it necessary only to advert shortly to some of the reasons upon which we think that the general words thus inserted comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind, with those which are specially enumerated and occasioned by similar causes. Emerigon in c. 12, s. 1, p. 360 of his *Treatise on Insurance*, in discussing the general rule that assureds answer for all loss and damages that happen on the sea, says, that it is to prevent doubts and vain disputes that in the printed formulas the following words have been inserted; and then he instances the general words to be found in the formulas of most of the principal commercial ports on the Continent. . . .

After stating the general words at the end of the enumerated perils in continental policies the opinion proceeds:

"But this is a case in which the assured is by the terms of the declaration and finding thereupon expressly exempted from the imputation of blame in respect to the loss in question. It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may also have a right to recover against the persons by whose immediate act the damage was occasioned. That has been decided in the case of a damage at sea by collision. The only inconvenience which can be suggested as likely to arise from a limited construction of the words, 'perils of the seas,' occurring in policies of insurance, and from the effect attributed to the general words, is that in doubtful cases the plaintiff will feel it necessary to introduce a special count. . . ."

CUNARD v. MARTEN (1902)

K.B.D., vol. ii. page 624.

Insurance, Marine—Subject-matter of insurance—Liability of ship-owner under contract of carriage—Suing and labouring clause—Applicability.

A number of mules, exceeding £20,000 in value, having been shipped on the plaintiffs' vessel for carriage under a contract which contained no clause exempting plaintiffs from liability for loss of the mules through the negligence of the plaintiffs' servants, the plaintiffs effected an insurance with the defendant, an underwriter at Lloyd's, to protect them against liability of any kind to the owners of the mules up to £20,000, owing to the omission of the negligence clause from the contract. The policy was in the printed form of an ordinary Lloyd's policy, containing the usual sue and

labour clause. During the voyage the vessel stranded through the negligence of the plaintiffs' servants, and expenses were incurred by the plaintiffs in saving some of the mules and in attempting to save others which were lost. The plaintiffs sought to recover these expenses, not as a direct claim under the policy, but under the suing and labouring clause as expenses incurred to avert or reduce the amount of the loss:

Held, that the sue and labour clause was inapplicable to, and formed no part of, the contract of insurance, and that the plaintiffs were not entitled to recover in the action.

WALTON J. (at page 625): ". . . The insurance was effected to protect the plaintiffs as owners of the steamship *Carinthia* against liability of any kind to owners of mules and/or cargo up to £20,000, owing to the omission of the negligence clause in the contract and/or Charter-Party and/or Bill of Lading on a voyage from New Orleans to any ports in South Africa. In this action there is no claim for a direct loss under the policy, that is to say, for any loss which the plaintiffs have suffered by becoming liable to the owners of the mules. Any claim there may be for any direct loss is reserved, the plaintiffs at present confining their claim to the amount of certain expenses alleged to have been incurred for the safeguard and recovery of the mules—or in other words, expenses incurred to avert or reduce the amount of the loss. These expenses are claimed as sue and labour expenses under the policy. . . .

" The first question in the case, which, if decided against the plaintiffs, puts an end to this action, is whether the suing and labouring clause in the printed form of the policy has any application to the insurance in question. . . . The expenses in respect to which this action is brought were incurred in the attempt made to tow the vessel off the rocks and in saving the mules which were saved, and attempting to save those which were lost. There is no doubt that the plaintiffs are liable to the contractor of the Admiralty for the mules which were lost, and this liability is within the meaning of the policy 'owing to the omission of the negligence clause in the contract of affreightment.'

" The difficulty of determining whether the sue and labour clause forms part of the contract of insurance in this case arises . . . from the very peculiar way in which contracts of marine insurance are expressed; . . . it is necessary to look at the description of the risk undertaken by the underwriters in order to determine whether that part of the printed form which is called the sue and labour clause has any application or forms part of the contract. A somewhat similar question had to be decided in *Xenos v. Fox*. The question which arose in that case was whether the sue and labour clause applied to that part of the policy called the 'running down clause'. . . . It was held that the sue and labour clause had no application to such a contract of indemnity contained in a policy on ship. The decision would have been the same if the policy had covered nothing but the risk of liability for collision. I refer to that case only as an illustration, and not as an authority upon which the present case can be decided.

" The construction of the policy now in question must depend upon its own language. . . . It is necessary to consider what was the precise character of the risk covered by the policy now sued upon. It was, as I have said, to cover shipowner's liability . . . owing to the omission of the negligence clause in the contract; . . .

there appear to me to be two possible views of the nature of the insurance. It may be an insurance for £20,000 on the mules, applying to the plaintiffs' interest as carriers responsible for the safe delivery of the mules. . . . If this is the true nature of the insurance, I see no difficulty in applying the sue and labour clause. It would not be distinguishable for the purposes of this case from an ordinary policy on goods. The plaintiffs, however, do not contend that the policy should be construed as an insurance on goods. They contend that the policy must be read as a contract by which the underwriters agreed to indemnify the plaintiffs against liability of any kind up to £20,000, which they might incur to the owners of the mules owing to the omission of the negligence clause. . . . I think that is the true construction of the policy, and that to treat it as a policy on goods would not give effect to the plain intentions of the parties as expressed in the policy. The present policy is, in my opinion, similar to the policy in the case of *Joyce v. Kennard* and, as was there said, not an ordinary marine policy. If, however, the policy is not to be treated as a policy 'on goods,' but as a contract of indemnity against a certain kind of liability up to a certain limited amount, it is very difficult to apply the suing and labouring clause to such a contract. That clause applies when there is suing and labouring for the safeguard and recovery of 'the said goods,' that is to say, the goods insured. As I have said, this is not an insurance on goods. Again, the sue and labour clause undoubtedly contemplates and implies that whilst the underwriters are to bear their share of any suing and labouring expenses, they are to bear such share only in the proportion of the amount underwritten to the whole value of the property or interest insured. . . . But how can this be applied in the case of a contract of indemnity against liability to a limited amount such as here sued upon?

"I fully recognise that a sue and labour clause might be framed which would be appropriate to such an insurance as was effected in the present case. But, in my judgment, any attempt to apply to the insurance in question a clause which was framed and intended to apply to an insurance of a different kind would work injustice, unless, in order to make the clause applicable to the insurance in question, it was so modified as to make it, in fact, a different clause altogether. I think that the suing and labouring clause in this policy, like many other parts of the policy, is inapplicable to the insurance actually effected, and was no part of the contract. I may add that if I thought the sue and labour clause must be held to apply, I should regard this as strong reason for treating the policy as an open policy for £20,000 on goods with the usual consequences."

DAVIDSON *v.* BURNAND (1868)

COMMON PLEAS, vol. iv. page 117.

Marine Insurance—Perils insured against—Unseaworthiness—Accidental injury from sea water.

A. effected a policy against "perils of the sea, etc.,," and "all other losses, etc.,," in the usual form upon goods for a voyage by a steamer from K. to T. While the steamer was loading in the harbour at K. her draught was increased by the weight of the cargo until the discharge pipe was brought below the surface of the water, which then flowed down the pipe under the valve, and some cocks or valves

in the machinery having been negligently left open, flowed into the hold and injured A.'s goods. In an action by A. upon the policy it was pleaded in defence, First, that the loss was not caused by the perils insured against; Second, that the ship was unseaworthy:

Held, that the injury was caused by one of the perils insured against.

Held, also, that the burden of proving that the vessel was unseaworthy was on the underwriters (defendants).

WILLES J. (at page 120): ". . . So far as regards the question of unseaworthiness, that is disposed of by the evidence of competent persons that the ship was seaworthy, and it seems therefore after that impossible for us to say that in our judgment the vessel was unseaworthy. . . . Then assuming the vessel to have been seaworthy, the question is whether the loss occurred by perils of the sea or some peril analogous thereto . . . the declaration is drawn alleging generally a loss by perils insured against, and so raises the question considered in *Cullen v. Butler* as to what is the loss which comes within the general words of the policy, 'all other perils, losses, etc.' The question therefore is not whether the loss here was strictly one occasioned by the perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from perils of the sea. Now a loss from perils of the sea would include the case of a loss from another vessel coming into collision with, and making a hole in the vessel, the subject of the policy, of the same capacity as that through which the water must have got into this vessel. . . . On the whole it is not necessary, I think, to say whether these goods were damaged by perils of the sea, as the damage to them was clearly caused by the perils of the sea or the like within the words of the policy. . . ."

DE CUADRA *v.* SWANN (1864)

COMMON BENCH REPORTS, New Series, vol. i. page 772.

Marine Insurance—Abandonment of voyage—Cargo forwarded—Seaworthiness of forwarding vessel.

In an action upon a policy on goods from Cadiz to Monte Video and Buenos Ayres, and also "on cash on account of freight, £216," the declaration alleged that the vessel while proceeding on the voyage sustained so much damage in a storm that she was disabled from proceeding without being repaired, and the expense of repair would be greater than her value when repaired together with the freight which she would have earned on the voyage. The Master abandoned the voyage, and the freighter procured two other vessels to carry the goods on at a rate of freight exceeding that originally payable under the Charter-Party. The declaration then went on to aver that one of the substituted vessels sustained so much damage that she was obliged to put back and unload the goods, which were sent on in the other. Among other pleas, one of unseaworthiness of the forwarding vessel which put back was set up by the underwriter:

Held, that the plaintiff was entitled to recover as for a total loss of the prepaid freight, and that the plea that the substituted vessel, into which the goods were first transhipped, was not seaworthy, was a bad plea.

The Court, consisting of ERLE C.J., Williams, Willes, and Byles JJ., were unanimously of opinion the Master was justified in abandoning the voyage, and the plaintiff was entitled to recover a total loss of prepaid freight, Willes and Byles JJ. stating the plea of unseaworthiness regarding one of the substituted vessels "to be clearly bad" (at page 796).

DE HART *v.* COMPAÑIA ANONIMA DE SEGUROS
AURORA (1903)

2 KING'S BENCH DIVISION, page 503, COURT OF APPEAL.

The plaintiff, a shipowner, effected with the defendants, underwriters, a time policy of insurance upon his ship containing the following clause: "General Average payable according to foreign statement if so made up." The plaintiff chartered the ship to third persons, and by the terms of the Charter-Party it was provided that the ship might carry a deck-load of timber, and that "in case of average . . . jettison of deck-cargo for the common safety shall be allowable as General Average." The ship sailed for Antwerp with a deck-load of timber, and in the course of the voyage and during the currency of the policy she suffered damage, so that it became necessary for the common safety, in consequence of perils insured against, to jettison part of the deck-cargo. On her arrival at Antwerp an Average Statement was there made up, and the Average Adjuster, in accordance with the terms of the Charter-Party, included the jettison of deck-cargo in General Average. By the Belgian Law, apart from contract, the jettison of deck-cargo is not the subject of General Average; but that law recognises any special provisions in a Charter-Party as to what shall be the subject of General Average:

Held, applying the rule in *Harris v. Scaramanga* (1872), L.R. 7 C.P. 481, that as the statement had been made up in good faith, and the Charter-Party imported no terms of a special and unusual character, such as could not reasonably have been contemplated by the parties to the policy of insurance, the defendants, the underwriters, were bound by the statement, and were therefore liable to indemnify the plaintiff against the ship's proportion of the loss on the jettison of the deck-cargo.

Decision of Kennedy J. (1903), 1 K.B. 109, affirmed.

The policies of insurance contained the Institute Time Clauses, 1900, and also the clause: "General Average payable according to foreign statement if so made up, or York-Antwerp Rules, if in accordance with the contract of affreightment." The Charter-Party contained the following clause: "In case of Average the same to be settled according to York-Antwerp Rules, 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as General Average."

The following Articles of the Belgian Code of Maritime Commerce were referred to in the argument.

Art. 100. Failing special agreements between all parties concerned, average losses are settled according to the following regulations:

Art. 109. Goods carried on the ship's upper deck contribute if saved. If they are jettisoned or damaged by jettisoning, the owner

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has no claim for contribution. He can only make use of his rights against the Master.

Art. 118. The statement of losses and damages is made up by experts (average staters) in the place where the ship is discharged at the instigation of the commander. The experts are nominated by the Tribunal of Commerce if the discharge takes place in a Belgian port.

Art. 119. The specialists nominated in accordance with the preceding article apportion the losses and damages. The apportionment becomes legally binding on approval by the tribunal.

VAUGHAN WILLIAMS L.J., after stating the facts, proceeded (at page 505): "Now Kennedy J. decided in favour of the plaintiffs on the ground that the average statement as made up was in accordance with Belgian law, because the Belgian law recognises in regard to general average the terms of any special contract of affreightment that the parties may have chosen to make. He also takes notice of another contention that had been made on behalf of the plaintiffs, to the effect that, having regard to the judgment of Bovill C.J. and Keating J. in *Harris v. Scaramanga*, these words in the policy of insurance, 'general average payable according to foreign statement if so made up,' were words which bound the underwriters, whether the foreign statement was made in accordance with the Belgian law as proved, or whether it was not; but having noticed it, he says that it is unnecessary for him to decide whether or not that assumption or that statement of law by Bovill C.J. and Keating J. was correctly made or not. That then being the state of things, we have had to consider whether the judgment of Kennedy J. is right. I am not at all prepared to say that his judgment may not be supported upon the ground on which he has himself put it. [With regard to the question of foreign laws, the learned judge considered it was one of fact and not of law, and proceeded at page 506:] I have always understood that it is a question of fact and not of law, and for that, amongst other reasons, I prefer to look and see whether the judgment of Kennedy J. can be supported upon other grounds.

"Now, in the first place, I am disposed myself to support that judgment upon the law as stated in the judgment of Bovill C.J. and Keating J. in *Harris v. Scaramanga*. In that case the paragraph in the policy is almost identical with the paragraph here, the words there being, 'to pay general average as per foreign statement if so made up.' Bovill C.J. says: 'It seems to me that the general effect of the memorandum is, to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum.' Then he deals with the question of the law of England and the law of Bremen, and proceeds: 'It seems to me, however, that under the terms of this policy the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign port if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure,

which are excluded by the express terms of the policy.' And then he says: 'It seems to me that by the express agreement of the parties, contained in the memorandum, it is not open to us to determine it'—that is, the question whether the claim was to be determined by the English Court or by the statement of the foreign average stater at Bremen—'and that we have only to see whether the foreign adjustment which gives rise to this claim has been, in fact, made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? And how does the matter stand upon the facts as stated in the special case?'

"In my opinion, so far from there being anything inconsistent with mercantile usage and mercantile convenience in so reading the clause in this policy, which is a very usual clause and one commonly adopted, I think it is in accordance with mercantile convenience. The parties primarily interested in the adjustment for the purpose of carrying into effect the rights to contribution based upon the law of general average may conveniently be left to deal with questions of contribution both in their contracts of affreightment and in other respects. If adjustment has to be effected in a foreign port, it seems to me obviously convenient that there should be an express provision that the underwriters in such a case shall stand in the shoes of the parties primarily liable. In my view of the law it is perfectly plain that in the absence of any special provision such would be the law: it would be the law without any special clause.

"Then in this particular clause the words following the expression 'if so made up,' are 'or York-Antwerp Rules, if in accordance with contract of affreightment.' It is said that the effect of those latter words is that the only case in which the shipowner is to be entitled to treat the matter of contribution as effected by the contract of affreightment is in case he adopts the York-Antwerp Rules without any qualification; and it is said that the result of that in this case is that one ought to apply the Belgian law here, and to give no effect whatsoever to the York-Antwerp Rules as qualified by the words of exception, and that that means one ought to go back to the simple Belgian law unqualified by this special bargain. I cannot so read these words. I think that there is nothing, at all events, in these words which in the slightest degree prevents us from applying the rule laid down by Bovill C.J. and Keating J. in *Harris v. Scaramanga*.

"Taking this view of the case, it seems to me unnecessary to consider the other questions which have been raised before us. The ground of my decision is simply that I apply the rule laid down by Bovill C.J. and Keating J., and applying that rule, I think that the underwriters here are bound by the foreign statement so made up.

"It was said in this case in addition, that we ought not to come to this conclusion having regard to the authorities, especially the following passage in the judgment of Cockburn C.J. in *Mavro v. Ocean Marine Ins. Co.*: 'The only sensible construction appears to be this: the underwriter is only to be liable for a general average, but what is general average is to be determined by the law of the foreign place to which the ship is bound.' I quite agree, but that only means in the absence of a special bargain; and, in my judgment, in this particular case there was a special bargain if this contract is properly construed, whereby the underwriters agreed to accept the average statement abroad, if so made up, as binding upon all

parties. I think, therefore, the judgment of Kennedy must be affirmed, and this appeal dismissed with costs."

ROMER L.J. (at page 508): "I have come to the same conclusion. It is admitted by the appellants' counsel that, with regard to the clauses in the policy of insurance which are material, the General Average was not to be made up according to the York-Antwerp Rules, inasmuch as, having regard to the special terms of the contract of affreightment here, which purported to incorporate these clauses with some exceptions, it could not be said that, within the meaning of this policy of insurance, the General Average could, by the contract of affreightment, be made payable per York-Antwerp Rules; and the appellants' counsel rested their contention accordingly on this—that the General Average ought to have been made payable according to foreign statement, whatever the term 'foreign statement' may have meant in this policy of insurance.

"Now there are two clauses in the policy of insurance dealing with the same subject-matter; they only differ in this, that in the clause in the body of the policy the words are: 'General Average payable according to foreign statement if so made up,' whereas the words 'if so made up' are omitted in the corresponding clause in what are called the Institute Time Clauses; but it is clear to my mind that the two clauses should be read together, and I have no hesitation, therefore, in coming to the conclusion that in this policy the foreign statement which is meant is the foreign statement if so made up. Now, I think that, by agreeing that General Average shall be payable according to foreign statement if so made up, the parties have in effect agreed to be bound by the foreign statement if made up as it exists in fact, subject only to two observations which I am about to make. In the first place, I think that in order to bind the parties, the statement so made up must have been made up in good faith; but it is not suggested here by the appellants that the statement has not been made up in good faith. In the second place . . . if the statement were made up according to the law of the port which recognised the special terms of the contract of affreightment, I doubt if the parties to the policy of insurance in a case like the present would be bound by the statement if the contract of affreightment imported terms as to General Average of a special and unusual character, which could not reasonably have been contemplated by the parties to the policy of insurance. If such a case arises, I should like to further consider it, but such a case does not arise here. I may point out that jettison of deck cargoes is in many cases allowable as General Average—for example, by English law in the case of voyages where deck-cargo is permitted by the established custom of navigation; and I may point out that in the present case the voyage was one where deck-cargo was so permitted, and therefore it could not be said that the contract of affreightment, so far as it referred to deck cargoes, was of so special or unusual a character as to be outside the reasonable contemplation of the parties to the policy of insurance.

"In the present case, therefore, I have no hesitation in saying that in my opinion the parties are bound by the statement which was, in fact, made up at Antwerp, and which, to my mind, decides the rights of the parties. I agree, therefore, in thinking the appeal fails."

Stirling L.J. delivered judgment to the same effect.

DENOON v. HOME AND COLONIAL ASSURANCE
COMPANY (1872)

COMMON PLEAS, vol. vii. page 341.

Marine Insurance—Valued policy on freight—Passage money—Mode of calculating amount recoverable on policy.

The defendants underwrote for £1000 a policy of Marine Insurance expressed to be "upon Chartered freight valued £7000, at and from Sydney to Calcutta and London." The risk was by the terms of the policy to commence from the loading of the said goods or merchandise, and to continue until they were safely landed. Upon the arrival of the ship at Calcutta, the voyage to England was abandoned in consequence of the failure of the charterers, and the ship was employed for the conveyance of 360 coolies and 1200 bags of rice to the Mauritius. Upon learning this the plaintiff, the assured, procured an alteration of the policy by the insertion of a memorandum in the margin, altering the voyage, and declaring the interest to be on freight valued at £2000. The intention of the plaintiff in effecting this insurance was to insure the freight of the rice only, but this intention was not communicated to the defendants. No binding custom of trade limiting the meaning of the word freight was proved; but the most frequent course in insurance business, where freight of coolies is intended, is to describe it as freight of coolies, or passage money of coolies, or by some other term distinguishing it from freight of merchandise. The rate of premium differs for the insurance of passage money of coolies and freight of goods. The ship was wrecked, and there was a total loss of the rice; but the coolies, with the exception of twelve, were saved, and their passage money, which was payable on arrival, paid. The plaintiff sued the defendants to recover as on a total loss the amount underwritten, being the half of the total value declared in the policy. The defendants contended that there was only a partial loss, as the freight or passage money of the coolies must be taken to be included in the term "freight used in the policy":

Held, that the question, whether the term "freight" in a marine policy includes passage money, must depend upon the circumstances of each particular case, and the context of the particular policy; that in the present case the term freight did not include such passage money, and consequently there was a total loss of freight insured by the policy; but that inasmuch as the valuation of freight in a valued policy *prima facie* refers to a full cargo, or the charter of the entire ship, and there was in this case nothing to show the underwriters that the valuation was less than such full freight, the valued policy as applicable to a partial cargo must be treated as an open policy for half the loss of freight not exceeding in any case £1000.

The judgment of the Court (Willes, Byles, Brett, and Grove JJ.) was delivered by WILLES J. (at page 348): ". . . The first and chief question therefore is whether the passage money of the coolies was freight within the policy, and to be taken in favour of the underwriters as included in the valuation.

" It is certain that freight is not ordinarily used in policies in its most extensive sense as including cargo, and the question in each case must be, what, under the circumstances, and in the context of the particular policy, it was intended to express. Until late periods there was little reason for insuring passage money . . . as it has been

and is in so many cases paid beforehand, so as not to be at the ship-owner's risk. . . . Accordingly, it is not surprising that no trace of passage money being treated as freight for the purpose of insurance is to be found in the reported cases, nor that the policy in common use should be framed with minute reference to circumstances affecting the ship and cargo, and, in terms at least, should make no reference to passengers.

"The case of *Flint v. Flemyngh* decides that 'freight' sufficiently represents the interest of the shipowner in the carriage of his own goods, and includes the value of their carriage.

"It appears that the most frequent course is to describe passage money by a distinguishing term and not merely as freight . . . so that, as a matter of business, the not mentioning the subject upon the occasion of the insurance would indicate that the freight was probably intended to refer to merchandise.

"This distinction is further supported in the case of the present policy by more than one consideration. First, the policy was originally upon chartered freight, and the charter was for goods only. Secondly, the policy not only generally provides, as do ordinary policies, for ship and goods as the subject-matter under consideration, but provides in specific terms applicable to the freight of merchandise only, for the time at which the risk is to commence.

"In this state of facts, and upon the circumstances of the policy in question, we adopt the view of the assured, that the freight of merchandise only was assured according to his intention declared to his agent. . . .

"The communications of the assured, coupled with the fact of the large number of coolies on board and the necessary provisions for their maintenance, are clear to show that the cargo of rice put on board was not a full or substantially a full cargo. . . . A valuation of freight refers *prima facie* to the freight of a full cargo or the charter of the entire ship; and in this case there was nothing to show the underwriters that the valuation was of less than such full freight. . . . It is not stated, and we must conclude could not be stated with certainty, what the total freight would have been had the vessel been filled up with cargo, or that there might not possibly have been a full cargo the freight of which would not have exceeded £2000. We must therefore, whilst on the one hand we decide in favour of the assured that the passage money of the coolies was not freight within the policy to make up a full freight . . . on the other hand we must hold in favour of the underwriters that the policy as applicable to a partial cargo was an open policy for half the loss of freight not exceeding in any case £1000. . . .

"In arriving at this conclusion as to the operation of the policy in case of the total loss of partial cargo, we act in accordance with the decision of the Court of King's Bench in *Forbes v. Aspinall*, as to freight, and that of this Court in *Tobin v. Harford*, affirmed in error, as to goods."

DICKENSON *v.* JARDINE (1868)

COMMON PLEAS, vol. iii. page 639.

Marine Insurance—Jettison—General Average—Liability of underwriters—Custom.

A. insured goods by a policy which included jettison among the perils insured against. The goods were jettisoned under circum-

stances which entitled A. to a General Average contribution from the owners of the ship and the rest of the cargo, which arrived safely at London, the port of discharge. A. having sued the underwriters for the whole amount insured, without having first collected the contribution to which he was entitled from the other owners of the ship and cargo:

Held, that he was entitled to recover; and that the underwriters having paid him would be then entitled to stand in his place with respect to the General Average contribution.

Held, also, that the liability of the underwriter under the policy could not be varied by a custom alleged to exist in the port of London between merchants and underwriters, to hold the latter liable only for the share of the loss cast upon the owner of jettisoned goods in the General Average Statement.

WILLES J. (at page 643): "Mr. Williams argued the case in the only way which was possible when he said that a case of jettison under the circumstances he detailed did not constitute a total loss of the goods, because in point of law the loss was less than total by the value of the right which accrued to have compensation for part of the loss from the shipowners and other owners of cargo. It was so in one sense, because if the vessel or any part of the cargo arrived safely in consequence of the jettison, the owners must contribute to the loss sustained by the owners of the goods sacrificed for the general advantage; but the goods were totally lost at the time, though their owner had a contingent right to recover from certain persons a portion of their value. The result is that the owner has two remedies: one for the whole value of the goods against the underwriter; the other for a contribution in case the vessel arrives safely in port: and he may avail himself of which he pleases, though he cannot retain the proceeds of both so as to be repaid the value of his loss twice over. This is the usual case where there is an insurance and a loss following therefrom within its terms which would be total but for the liability of a third person. It has been so settled since the case of *Randall v. Cockran*. . . . If the assured proceeds against the underwriters in the first instance, the latter cannot avail themselves by way of plea that the assured has a distinct right against some other person. They must pay the amount claimed in the first instance, and will then be entitled to use the name of the assured, and proceed against the other parties who are liable. . . . With respect to the alleged custom, it was not proved, the evidence at most showing only a practice adopted in undisputed cases; and, moreover, the loss being one springing directly from the contract of insurance, could not be affected by such a usage, if proved."

Bovill C.J. and Montague Smith J. delivered judgments to the same effect.

DIXON *v.* SADLER (1839)

MEESON AND WEISEY'S REPORTS, vol. v. page 405.

Marine Insurance—Seaworthiness in Time Policy.

To a declaration on a time policy for six months stating a loss by perils of the sea, the defendant pleaded that though the vessel was lost by perils of the sea, yet such loss was occasioned wholly by the wrongful, negligent, and improper conduct (the same not being barratrous) of the Master and crew of the ship, by throwing over-

board so much of the ballast that the vessel became unseaworthy and was lost by perils of the sea, which otherwise she would have encountered and overcome:

Held, that the plea was bad, and that the underwriter was liable for the consequences of the wilful but not barratrous act of the Master and crew in rendering the vessel unseaworthy before the end of the voyage.

The judgment of the Court was delivered by PARKE B. (at page 413): ". . . And the plea therefore raises the question whether the underwriters are not liable for the wilful but not barratrous act of the Master and crew in rendering the vessel unseaworthy before the end of the voyage by casting overboard a part of the ballast. We have considered it, and are of opinion that the plea is bad in substance and that the plaintiff is entitled to judgment. . . . The question depends altogether upon the nature of the implied warranty of seaworthiness . . . between the assured and the underwriter on a time policy. In the case of an insurance for a certain voyage it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects to encounter the ordinary perils of the voyage insured at the time of sailing upon it. . . . But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the Master and crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy where the loss has been immediately occasioned by the perils insured against. . . . If there be any fault in the crew, whether of omission or commission, the assured is not responsible for its consequences. . . . The great principle established by the more recent decisions is that if the vessel, crew, and equipment be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the Master or crew. . . . If the case then were that of a particular voyage there would be no question as to the insufficiency of the plea; and the only remaining point is whether the circumstance of this being a time policy makes a difference. There are not many cases in which the obligation of the assured in such a case as to the seaworthiness or navigation of the vessel is settled; but it may be safely laid down that it is not more extensive than in the case of an ordinary policy, and that if there is no contract as to the Master in the one case there is none in the other. Here it is clear that no objection arises on the ground of seaworthiness of the vessel until that unseaworthiness was caused by throwing overboard of a part of the ballast by the improper act of the Master and crew; and as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance and the plaintiff entitled to our judgment."

"DORA FORSTER" (1900)

PROBATE, page 241.

Marine Insurance—Time policy—Repairs to ship—Particular Average loss—Subsequent total loss—Assured not liable for cost of repairs—Non-liability of underwriters.

A vessel under a charter to load home sustained damage on the outward voyage, which was repaired on arrival at port of loading,

and a payment on account of the Particular Average loss was made to the owners by the underwriters on a time policy on Hull and Machinery.

The repairs were paid for at the port of loading by the charterers as disbursements secured by draft in their favour (including commission and insurance) signed by the Master pledging the ship for payment on safe arrival at the port of discharge. The draft was insured by the charterers. The vessel was totally lost on the homeward voyage, and the underwriters on the time policy paid a total loss, but the shipowners brought an action against them to recover the balance of the Particular Average loss. The underwriters counterclaimed for a return of the payment on account:

Held, first, the shipowners could not recover as they were never personally liable for the cost of the repairs and had sustained no loss, the amount of the draft, on the loss of the ship, having been paid to the charterers by their insurers; second, that the underwriters were entitled to a return of the amount paid on account as a payment made without prejudice and under a mistake of fact.

GORELL BARNES J., after stating the facts (at page 248): "The question is whether those facts give rise to any claim against the underwriters on the original policy on the ship. In my opinion they do not, and my reason is this: I have found as a fact that the Master at the port of shipment, when he was arranging for these repairs to be done, arranged with the parties that they should be liquidated in the same way as the ordinary disbursements were going to be liquidated, and I think he carried out the transaction in such a way that the owners of the ship never became liable to pay for the cost of these repairs. That brings the case within the principle stated in s. 1267 of the fifth edition of Phillips on Insurance. 'In England and the United States the underwriters are unquestionably liable for a subsequent total loss in addition to the expense of previous repairs which have been previously paid for by the assured in distinction from those made by means of funds raised on bottomry.' The meaning of that passage is, that where a Particular Average damage has been incurred, and the Master arranges for the repairs, which are thus necessitated, being discharged by means of money raised on bottomry, he never imposes any personal obligation upon the owners of the ship; or any obligation upon them to pay if the vessel is lost on the way home; and that therefore if the vessel is lost on the voyage home, and the underwriters pay a total loss, the assured does not in fact sustain a partial loss, because he never has to pay for it, and is adequately and properly indemnified by being paid by his underwriters for the subsequent total loss. There is no doubt that in the case of bottomry that meets the necessity and the justice of the case.

"The decision I have come to in this case is, that there is, legally speaking, no substantial distinction which I can detect between the case of bottomry and the present case. . . . This case is of quite a different class from that of *Lidgett v. Secretan*, because there never was a loss for which the owners of this ship could make any claim.

"One other point remains, and that is that the defendants have already paid £52 on account, and this they seek to recover. . . . It was paid under a mistake of fact—that is, on account of what they might ultimately be found liable for. There being no liability, the money must be returned."

DUDGEON *v.* PEMBROKE (1877)

2 APPEAL CASES (HOUSE OF LORDS), at page 284.

Marine Insurance—Time policy—Warranty of seaworthiness—Perils insured against.

A policy of insurance was effected on ship from 24th January 1872 to 23rd January 1873, both inclusive. These words were written on a printed form which also contained, in print, "at and from" and "for this present voyage," and other similar words which were commonly found in the forms of a voyage policy, and which had not been erased or struck through :

Held, that the policy was really a time policy, and its character was not affected by the printed words thus negligently left in the form.

In a time policy, the law, in the absence of special stipulation in the contract, does not imply any warranty that the vessel should be seaworthy; *Gibson v. Small*, supplemented by *Thomson v. Hopper* and *Fawcett v. Sarsfield*, declared to have set at rest all controversies on this subject.

If a shipowner knowingly and wilfully sends his ship to sea in an unseaworthy condition, the knowledge and wilfulness are essential elements in the consideration of his claim to recover.

A time policy was effected on an iron steamer then lying in the yard of its owner, a shipwright. It had been put under repair, and no stint had been placed on the repairs; and the marine engineer who superintended the repairs, and the workmen who executed them, believed them to be completely satisfactory. It was expressly found that if the ship was unseaworthy the assured was ignorant of the fact. The ship went with nothing but a deck-cargo of iron machinery from London to Gothenburg; made more water on the voyage than could have been expected from the state of the weather; ceased to do so on getting into harbour; was examined, and its condition on the voyage could not be accounted for; and in a few days afterwards took on board a cargo of oats, 380 tons of iron, and a deck-load of timber; started from Gothenburg; encountered in the open sea very bad weather, which put out the fires; ran for the port of Hull; could not make the port; ran ashore, and after some time was broken up and became a total wreck :

Held, that these facts showed a loss by perils insured against, the perils of the sea, and that the assured was entitled to recover as for a total loss.

A loss caused immediately by perils of the sea is within the policy, though it might not have occurred but for the concurrent action of some other cause which is not within the policy.

LORD PENZANCE (at page 293): ". . . My lords, the policy in this case is a time and not a voyage policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to ship, the policy is something less or something more than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against, without striking out the printed words which

may be applicable to a longer or different contract, is too well known, and has been too constantly recognised in Courts of Law to permit any such consideration.

“ The policy then being a time policy, the first question raised for your Lordships’ determination is whether the law implies in such a contract any warranty that the vessel should be seaworthy at any period of the risk, and if so at what period or periods. . . .

“ I do not propose to trouble your Lordships by reviewing the arguments on this question, because I consider the case of *Gibson v. Small*, supplemented as it was by the two cases of *Thompson v. Hopper* and *Fawcus v. Sarsfield*, must be considered to have set at rest the controversy on this subject, and finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy. . . . It was next contended that the vessel in this case was not lost by perils of the sea. . . . The circumstances of the vessel’s loss are detailed in the special case. . . . These facts require no argument. If ever a vessel was lost by perils of the sea, understanding these words in the sense which the Courts in this country have uniformly ascribed to them, this vessel undoubtedly was so, and the real question intended to be raised therefore is, whether a vessel not strong enough to resist the perils of the sea (in another word unseaworthy) can be properly said to be lost by perils of the sea when it is clear that by the force of the winds and waves it went ashore and finally broke up and went to pieces. . . . The question, therefore, is in substance the same as that raised by the sixth plea . . . that the vessel sailed from London in a wholly unseaworthy condition in the voyage on which she was lost, and that the ship was lost as alleged by reason of such unseaworthiness. For this plea must be understood to mean, not that the vessel did not perish immediately by the action of the winds and waves, . . . but that the loss by these perils of the sea was brought about by the vessel’s unseaworthiness.

“ It will at once occur to your Lordships upon the raising of such a question, that it applies as much and as fully to a voyage policy as to a time policy. If a loss proximately caused by the sea, but more remotely and substantially brought about by the condition of the ship, is a loss for which the underwriters are not liable, then quite independently of the warranty of seaworthiness, which applies only at the commencement of the risk, . . . the underwriters would be at liberty in every case of a voyage policy to raise and litigate the question whether at the time the loss happened the vessel was, by reason of any insufficiency at the time of leaving a port where it might have been repaired, unable to meet the perils of the sea, and was lost by reason of that inability.

“ The case of *Fawcus v. Sarsfield* was relied on . . . in which . . . the Court held that the Arbitrator had ‘ found that the necessity of repairs did not arise from any peril insured against, but from the vice of the subject of insurance.’ . . . The question, it seems to me, is not what losses ought in the abstract to be borne by the assured as being imputable to him or his agents on the one hand, or by the underwriters as being caused by the elements on the other hand, but what losses they have mutually agreed should be borne by the underwriters in return for the premium they have received. These losses are in the contract of insurance amongst others declared to be all losses by ‘ perils of the sea.’ A long course of decisions in the

Courts of this country has established that 'causa proxima non remota spectatur' is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it. . . . The only exception which has hitherto been established to the underwriters' liability thus construed is to be found in the case of *Thompson v. Hopper*, where it was alleged that the shipowner knowingly and wilfully sent the ship to sea in an unseaworthy state, and she was lost in consequence.

"It is only necessary to observe on that case that the knowledge and wilful misconduct of the assured himself was an essential element in the decision arrived at. . . ."

The Lord Chancellor (Cairns), Lords O'Hagan, Blackburn, and Gordon concurred.

DUFF *v. MACKENZIE* (1857)

COMMON BENCH REPORTS, New Series, vol. iii. page 16.

Marine Insurance—Free of all average—Total loss of part.

An insurance was effected on Master's effects valued at £100, free of all average. Some of the articles thus insured were totally lost by perils insured against, but others were saved:

Held, distinguishing the case from *Ralli v. Janson*, that the assured were entitled to recover in respect of the goods which had been totally lost.

The judgment of the Court was delivered by WILLIAMS J. (at page 28): ". . . On the part of the defendant it was assumed that he was exempted by the average memorandum because the loss was only a partial loss of the subject insured; and it was argued that the present case must be governed by the recent decision of *Ralli v. Janson*. . . . We are of opinion that the present case is distinguishable from *Ralli v. Janson*, and that the rule to enter the verdict for the plaintiff must be made absolute. In that case the Exchequer Chamber thought that as the insurance was on goods generally, and by the memorandum 'seed' was warranted free from average, it was necessary, in the natural construction of the terms of the instrument, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the Court could not apply the warranty to each bag in which the seed happened to be packed as a distinct object.

"But no such difficulty occurred, we think, in the present case. The articles which constitute the Master's effects have no natural or artificial connection with each other, but of necessity must be essentially different in their nature and kind, in their value, in the use to be made of them and the mode in which they would be disposed on board . . . although it is stipulated by the warranty that these effects shall be free of all average—or, in other words, that the insurer shall not be liable for any amount of sea damage to them short of total loss—we think, looking at the nature of the subject of insurance and the terms of this exemption, it is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consisted. . . . The object for which it is well known the memorandum was introduced into policies, viz. that since it

may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually specified in the memorandum, receive in the course of a voyage—whether it arose from the nature of the articles themselves or from the perils insured against—the insurers thereby expressly provide that as to some kinds of goods they will not be answerable for any average or partial loss, and as to others that they will not be liable for such loss not amounting to a certain percentage of the goods.”

FISK v. MASTERMAN (1841)

MEESON AND WELSBY, vol. viii. page 165, COURT OF EXCHEQUER.

An insurance was effected on the 12th April on a cargo of cotton then at sea, by five several policies, at the rate of fifty guineas per cent; and on the 13th, news of the vessel's safety having arrived, a further insurance was *bona fide* effected by six different policies, at ten and five guineas per cent. The latter insurance added to the former exceeded in amount the value of the subject-matter insured, but the former of itself did not :

Held, that the assured were entitled to a return of premium on the amount of the over-insurance, to which the underwriters who subscribed the policies of the 13th April were to contribute rateably in proportion to the sums insured by them respectively (the amount of over-insurance to be ascertained by taking into account all the policies), but that no return of premium was to be made in respect of the policies effected on the 12th.

By the consent of both parties, it was ordered by Parke B. that the facts should be turned into a special case for the opinion of the Court.

The plaintiff, who is a merchant at New Orleans, in February 1839, shipped 1957 bales of cotton on board the ship *Bradshaw*, on a voyage from Mobile to Liverpool, and consigned the said cotton to Messrs. Holford & Co., of Liverpool, merchants, who have also a business in London, and advised them of the shipment by a letter bearing date 15th February 1839, as follows :

“ The ship *Susanna Cummings*, and the ship *Bradshaw*, sailed from Mobile on the 8th or 9th, the former an American ship with 1850 bales, the latter an English ship with 1957 bales cotton for my account to your address. If these vessels have not arrived you will please effect insurance, valued policies, valuing the cotton at sixty dollars per bale.”

This letter reached Messrs. Holford & Co. in the early part of April 1839, and at that time the *Bradshaw* had not arrived and was out of time; and as there had been a violent hurricane on the 5th and 6th of March preceding, the Liverpool underwriters declined taking the risk when applied to by Messrs. Holford & Co. pursuant to their instructions.

On the 11th April Messrs. Holford & Co. wrote to their London house to effect insurance on the cotton by the *Bradshaw*; and the London house on the 12th April effected insurances to the amount of £14,150, at the rate of thirty guineas per cent upon £1000, and fifty guineas per cent upon £13,150.

Of this insurance the London house advised the Liverpool house of Holford & Co. by letter on the 12th April, announcing the difficulty they had in effecting it, and the little probability there was of their

being able to effect any more in London, though they would try to do so, and recommending the Liverpool house to effect what they could there.

On the 12th April it was known in Liverpool and on the 13th in London, that the *Bradshaw* had been spoken with off Cape Clear on the coast of Ireland and within a few days' sail from Liverpool; and on the 13th April the London house of Holford & Co. effected further insurance to the amount of £12,300 at ten guineas per cent, making in the whole effected in London £26,450.

On the 13th April the Liverpool house of Holford & Co. effected insurances on the cotton in Liverpool, to the amount of £10,000 at five guineas per cent. The whole amount of insurance, therefore, upon the cotton in London and Liverpool amounted to £36,450, and was distributed as follows :

LONDON POLICIES

1839.		£ Guineas.	
12th April.	London Indemnity Marine	.	3,000 at 50
	Alliance	.	5,000 , 50
	Marine, London	.	1,000 , 50
	Thornton and others	.	4,150 , 50
	London Marine	.	1,000 , 30
13th April.	Indemnity Mutual Marine	.	3,500 , 10
	Alliance	.	6,000 , 10
	Thornton and others	.	2,800 , 10

LIVERPOOL POLICIES

13th April.	Jones and Hodgson	.	1,500	5
	Thomas Morris and others	.	1,500	5
	M'Murdo & Co.	.	7,000	5
				36,450

The cotton was valued in the policies at £15:10s. per bale, which upon 1957 bales gives £30,333:10s., the value of the subject-matter of the insurance as stated in the policies. There is, therefore, an excess in the insurance beyond the value of the cotton and the interest of the assured therein to the amount of £6116:10s.

At the time of effecting the insurances by the London and Liverpool houses of Holford & Co. on the 13th April, each house was ignorant of the amount insured by the other, or whether anything had been insured beyond what was done on the 12th.

The ship and cotton arrived safely in Liverpool, and a return of premium was claimed from the underwriters on all the policies, on the ground of short interest, to the amount of £6116:10s.

The defendants, who had insured the cotton to the extent of £5000, at fifty guineas per cent, by a policy effected in London, and dated the 12th April, and mentioned in the foregoing list as the policy for that amount effected with the "Alliance," were called upon to repay to the assured the sum of £440:9:2, being the estimated proportion of premium according to the plaintiff's calculation, which ought to be refunded by them on account of the over-insurance, the plaintiff contending that the underwriters upon *all* the policies should make the return in a general equal proportion according to the amount taken or assured by each upon the entire interest.

This, however, was resisted by the defendants, who contended, that if there was to be any return at all, it ought only to affect those policies which were made in Liverpool or in London on or after the

13th April, and that the underwriters upon the policies effected in London on the 12th April before it was known that the vessel had been spoken with, are not bound to make any return of premiums under the circumstances before mentioned. And the question for the opinion of the Court is, whether the underwriters upon the above policies, or any of them, are bound to return any part of the premiums, and if they or any of them are, in what proportion and upon what principle the calculation is to be made.

Per curiam (Lord Abinger C.B., Parke, Alderson and Rolfe B.B., at page 171). The judgment must be for the plaintiff to have a return of the premium to the amount of the over-insurance, to which the underwriters who subscribed the policies on the 13th April are to contribute rateably, in proportion to the sums insured by them respectively on that day, the amount of over-insurance to be ascertained by taking into account all the policies, but no return of premium to be made in respect of the policies effected on the 12th April.

FLINT *v.* FLEMING (1830)

BARNEWALL AND ADOLPHUS REPORTS, vol. i. page 45.

Freight of Shipowner's Goods.

A shipowner having effected a policy on freight may, in the event of loss, recover from the underwriter the value of the benefit he, the shipowner, would have derived (if there had been no loss) by carrying his own goods on the voyage insured.

The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them.

Action on a policy of insurance, dated 7th January 1828, on freight on the ship *Hope* at and from Madras to London. The vessel arrived in Madras Roads on 30th November 1827. Until 5th December 1827 the crew were engaged discharging the outward cargo, and on the 6th the vessel was lost by perils of the sea. No part of the homeward cargo had been shipped, but the Master had purchased at Madras, by order and on account of the plaintiff his owner, 25 tons of redwood; a commercial house had contracted to ship 122 tons of saltpetre, and one of the partners had engaged to ship 90 tons of light goods, but as to these goods there was no contract in writing. It was objected that the plaintiff could not recover on a policy on freight the loss which he sustained by having been deprived of the opportunity of carrying his own goods in his own ship; secondly, that as there was no contract to ship the light goods the risk as to them had not attached.

LORD TENTERDEN C.J. (at page 48): "If it be a necessary ingredient in the composition of freight that there should be a money compensation paid by one person to another, the benefit accruing to a shipowner from using his own ship to carry his own goods is not freight. But if the term 'freight,' as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at

the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in the policy. Before the statute of 19 Geo. II. c. 37, it was not necessary to prove any interest in the subject-matter of insurance. Since that statute, it would be as good a proof of interest in freight, to show that the owner of a ship was conveying his own goods in his own ship as that he was conveying the goods of others.

"Then as to the other point, to recover upon a policy on freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned either by showing that some goods were put on board or that there was some contract for doing so. The question was not submitted to the jury whether there was any contract . . . for the shipment of the light goods. The defendant is therefore entitled to a new trial upon that ground, but he must at all events have a verdict against him for the amount of the freight on the redwood and saltpetre. . . ."

Bayley and Parke JJ. were of the same opinion.

THE "GLENLIVET" (s.) (1894)
PROBATE DIVISION, page 48, COURT OF APPEAL.
Burnt.

A ship is not "burnt" within the meaning of the memorandum in a Lloyd's policy of insurance—"warranted free from average under three pounds per cent unless stranded, sunk, or burnt"—unless the injury by fire is such as to constitute a substantial burning of the ship as a whole.

Fires occurred on board the *Glenlivet* on three several and separate voyages, which, for purposes of convenience, were described as No. 1, 2, and 4 voyages.

The details as to the fires were shortly as follows:

On 6th May 1892, voyage No. 1, the cross bunker was observed to be on fire owing to the coals having heated. Part of the coals were discharged and the fire put out by pumping water on it. On May 29 the port bunker was observed to be on fire, but it was put out by pumping water on it. There was no damage to the ship's structure.

On 26th July, voyage No. 2, the starboard bunker was found to be on fire. Coal was worked out of it and water pumped down to put it out, the deck hose being burnt in so doing. On the following day a fire was found to have broken out again in the starboard bunker. The coal was trimmed, water pumped down, and the fire put out in about four and a half hours. There was some damage to the plating of the ship, some plates and angle irons being buckled, paint burnt off, and some of the coal had been converted into coke.

On 14th October, voyage No. 4, the cross bunker was found to be on fire, but was extinguished in an hour; there was some damage to the vessel: one plate and angle bar buckled and broken, riveting started, brick and wood casing destroyed; also four hatches and one fore and after; donkey funnel damaged, buckled and bent.

In the Court below Gorell Barnes J. gave judgment for the defendant, holding that the ship had not been "burnt" within the meaning of the memorandum in the policy, as the injury by fire must be "sufficient to cause some interruption of the voyage, so

that the vessel is, *pro tempore*, incapable of being properly used for the purposes of the voyage," that is, when the ship is "temporarily innavigable."

LINDLEY L.J. (at page 52): ". . . Now the facts are not in dispute. There was a fire on board this ship in one of the coal bunkers, and the fire was so severe that some damage was done to the structure of the ship; it is unnecessary to particularize it, but a plate got cracked and some angle irons got bent. The ship was an iron ship; how much wood was on board I do not know, but it is sufficient to say that the fire clearly injured the ship.

"Now comes the question whether this ship was 'burnt,' within the meaning of that expression. Barnes J. has held that it was not; and in my opinion that is obviously right. I say 'obviously,' because we must look at this word 'burnt' in reference to the context: it is part of a phrase 'unless the ship is stranded, sunk, or burnt.' What does that mean? I take it the context shows that what is meant is that the ship, as a whole, must be stranded, sunk, or burnt, and I cannot accept the construction or suggestion of the plaintiff's counsel that any fire on board a ship, doing a little structural damage to the ship itself, is a burning in ordinary language. It appears to me it is not so. In the course of the argument, cases have been put of a fire on board ship extinguished before any substantial damage has been done; can you say the ship is burnt? Of course in one sense it is burnt: anything that burns any part of a ship is a burning of the ship; but I cannot think that is the meaning of it here; and if this case had been tried before a special jury, I should have thought the duty of the judge would have been to give the jury a direction to this effect: 'Although there is a fire on board the ship and the ship is injured, that is not necessarily enough; you must ask yourselves whether the ship was, in fact, burnt.'

"Although it is extremely difficult to draw the line, yet in ninety-nine times out of a hundred you can see on which side of the line a case falls. If you ask anybody to draw the line between light and shade when they fade off from one to the other, he cannot do it; but one can often see plainly enough whether an object is in light or shade, and many cases may be practically dealt with in that way.

"I do not pretend to draw the line; but I can see as plainly as any juror, or as any ordinary man should see, that this ship has not been burnt. There has been some damage done; but the ship has not been burnt. That appears to me the true construction of this policy."

(At page 54) "What I have stated is, to my mind, the clear meaning of the expression, when you take the word 'burnt' in connection with 'stranding' and 'sunk.' This appeal must be dismissed with costs."

A.L. Smith and Davey L.J.J. gave judgments to the same effect.

HANSEN v. DUNN (1906)

II COMMERCIAL CASES, page 100.

Duty to cargo-owner—Perishable cargo—Port of refuge—Discharge of cargo—Repairs or transhipment—Delay—Abandonment of voyage.

Action brought by a shipowner to recover a general average loss due in respect of the carriage of a cargo of maize of which the

defendants were the owners. The general average loss was admitted, but counter-claim was made for damages for deterioration to the maize caused by the Master's negligence keeping it in the hold for an unreasonable time during the vessel's detention at Cape Town, and before electing to forward it to its destination, Port Elizabeth.

The case involved the question of the extent of the duty of the shipowner or master to take care of cargo during repairs to ship at a port of refuge under modern conditions, when in full communication with the cargo-owner and the underwriters on ship and cargo.

KENNEDY J. (at page 101): "The *Closeburn*, a Norwegian barque bound with a cargo of maize from Rosario to Port Elizabeth, took refuge in a damaged condition at Cape Town on 9th October 1903. Surveyors sent to examine the *Closeburn* and her cargo at the Master's request and by the authority of Mr. Ohlsson, the Norwegian Consul General, who acted as the owner's agent at Cape Town in regard to the *Closeburn*, reported on 14th October that the ship should be brought into dock, and that the cargo should be discharged as speedily as possible; again, on 16th October, that it was advisable in the interest of those concerned that the cargo be discharged immediately, as otherwise the conditions were such that it must deteriorate. Indeed, it was manifest to every one that, as the cargo of maize was heated and sweating very considerably, each day of detention in the hold must add materially to the loss in value. Mr. Ohlsson, writing to the plaintiff on 21st October, tells him, 'In order to protect one's self against damage and eventual claim we have taken the opinion of an expert, and he also agreed with the other surveyors that the cargo ought to be discharged to such an extent that further heating and sweating should be prevented. With this in view, we have, after consulting with the captain, arranged to bring the vessel into dock.' It is the duty of the ship-owner, to quote the language of Willes J. in *Notara v. Henderson*, 'To take reasonable care of the goods entrusted to him, not merely doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, from the necessary effects of which there is by reason of the exception in the bill of lading no original liability.' When a ship is damaged and obliged to put into an intermediate port for repairs, as was the *Closeburn*, it is the duty, as well as the right of the shipowner, if he can repair his ship without unreasonable sacrifice and within a reasonable time, to repair his ship and carry the goods to their destination. This is the purpose for which he has been entrusted with the cargo, and this purpose he is bound to accomplish by every reasonable and practicable method. (Abbot on Shipping, 13th ed., p. 412, cited by Carver, "Carriage by Sea," sec. 301.) If he so determines to fulfil his contract, it is his duty, whilst the repairs are being done, to take all reasonable means to preserve the cargo from deterioration. If, on the other hand, the circumstances are such that the shipowner is justified in not repairing his ship, or are such that, even if the ship is eventually repaired, it is not, with a due regard to his own interest and the interest of the owner of the cargo, reasonably practicable, owing either to the length of time which the repairs will take, or the perishable nature of the cargo, or to the expense involved, or all or any such reasons, that the carriage of the cargo should be completed in the ship when

repaired, then the shipowner is at liberty to tranship and carry the cargo to its destination in another bottom, and so earn his freight. He is not bound to employ another vessel to complete the voyage at his own loss. But if he chooses, because he deems it best and for his own advantage, to pursue this course, he must where he has been entrusted with a perishable cargo, which is daily incurring on shipboard an increase of deterioration, use all reasonable promptitude in procuring the transhipment and take all reasonable means to prevent, or at least to minimize, the deterioration of the cargo until the transhipment is effected. Lastly, if the shipowner decides neither to repair nor to tranship, it is his duty, with the greatest despatch of which the circumstances, reasonably considered, admit, to inform the owner of the cargo, or his agents on the spot, in order that he or they may not be unreasonably hindered in the protection of his interests, and the perishable cargo may not be unnecessarily damaged by the lapse of time before the owner or his agents have it placed at his or their disposition. In the present case it appears to me that, as Mr. Hamilton contended on behalf of the defendants, all justification for the plaintiff, the owner of the *Closeburn*, delaying to do one or other of these things (namely, either to discharge the cargo and abandon the voyage at Cape Town; or, secondly, to tranship it; or, thirdly, if he still desired to leave open the possibility of repairing the *Closeburn* and carrying the cargo to its destination in that vessel, to discharge and store the cargo in a proper warehouse where its preservation would be attended to), terminated with 28th October. There had, no doubt, been difficulties,—considerations arising from conflicting, or at all events, not easy reconcilable, interests of the shipowner, cargo-owner, and underwriters on ship and freight and cargo,—for which, in a just judgment of his conduct, the plaintiff, who had the cargo on board his damaged ship, would clearly be entitled to have a fair allowance of time made. But by the 28th the ground was clear for the shipowner's action. It had been wished by the underwriters on cargo, that the *Closeburn* should be towed from Cape Town to Port Elizabeth. The underwriters on ship objected to this, apparently with good reason; and as early as the 22nd October this course had definitely been rejected, and on this date the *Closeburn* was docked and 1300 bags were discharged. On 26th October 1903, Mr. Ohlsson, the plaintiff's agent, had in his hands the joint report, written on the 26th inst., of Messrs. Price, Hodgson, & Marchussen, after they had surveyed the *Closeburn* and her cargo by his authority and at the request of the Master of the vessel, and this report repeated their opinion expressed by these surveyors on 14th October, that the cargo should be at once discharged, as it was deteriorating day by day owing to its heated condition. On 28th October Mr. Ohlsson received a report made on that date by Mr. J. C. Miller at his request. Mr. Miller was the manager of one of the largest firms in the grain trade at Cape Town, and had himself great experience in the grain trade. In this report Mr. Miller stated: 'The surveyor understands the vessel will be two or three months at Cape Town before repairs can be completed, and, under these circumstances, he recommends immediate discharge at Cape Town to prevent the cargo becoming wholly unmerchantable. Even if stored for two or three months it would become very weevilly, and it is a question for those concerned to consider whether immediate reshipment in another bottom would not more than compensate the payment of an extra freight as against deteriorated condition when

the vessel is ready to reload, and the extra expense of cartage, rent, and insurance.' What then was the position of affairs? . . . It appears to me to follow that it became the plain duty of the plaintiff, if he accepted this view as to the impracticability of landing the cargo with a view of sending it on in the *Closeburn*, to decide at once to do one of two things without further delay. He might say, 'I abandon the voyage; I discharge the cargo here;' or he might say, 'I elect to tranship,' and take immediate measures to tranship, as he did towards the end of November. In fact, the plaintiff, who was kept informed of everything by cables . . . did neither of these things. He did not want to lose his freight, and, presumably, on the suggestion of the underwriters on freight, he started a negotiation for discharge at Cape Town upon condition of the payment of a *pro rata* distance freight, and then when this failed, and only then, on or soon after 18th November, he began, through Ohlsson, to take the steps suggested by Mr. Miller's report on 28th October, namely, to arrange for transhipment and the forwarding of the goods to Port Elizabeth in other bottoms. It appears to me that to keep this cargo (with the exception of the 1300 bags landed earlier at Cape Town) in the hold of the *Closeburn*, in disregard to every survey report, from 14th October onwards, became, at all events after 28th October, an actionable breach of duty. I cannot find any justification for the shipowner's proceeding. If, instead of promptly transhipping, he preferred to negotiate for that to which he was not entitled, a *pro rata* freight on discharge of the maize at Cape Town, he had no right, in order to try to obtain this advantage, to keep the goods meanwhile where he knew that they were daily suffering damage and might become thereby unmerchantable. If he wished, for his own advantage, to delay action, it could only be done, in common fairness, by his incurring the expense involved in his doing his best for the goods by discharging them out of the *Closeburn*'s hold. . . . Neither the defendants nor the underwriters could control the plaintiff. He was entitled as shipowner, if he pleased, to carry on the goods to their destination and earn his freight. . . . For the damage caused by keeping this cargo in the ship's hold at Cape Town from 28th October until transhipment, I hold that the defendants are entitled to damages on their counter-claim."

HOULDER *v.* MERCHANTS' MARINE INSURANCE COMPANY (1886)

APPEAL CASES, Q.B.D., vol. xvii., page 354.

Marine Insurance—Risk of craft till goods landed—Transhipment from lighters into export vessel.

A policy of insurance on goods which includes "all risk of craft until the goods are discharged and safely landed," does not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel.

Steel rails insured from Hull to London including all risk of craft. On arrival rails placed on lighter for transhipment to export vessel, during transhipment, which was lengthened owing to export vessel not being ready to receive them, a portion were lost by swamping of the lighters.

The judgment of the Court (Lord Esher M.R., Bowen and Fry L.J.) was read by BOWEN L.J.

(At page 355) . . . The question whether a reasonable time had elapsed after the discharge into lighters for transhipment, does not arise in its simple sense if the risks covered by the policy did not include the risk of waiting in lighters for transhipment into an export vessel, and our opinion is that such in fact was the case. . . .

The policy in question includes all risk of craft until the said goods or merchandise be discharged and "safely landed." The risk insured against is the risk of the transit upon the lighters, which have in the ordinary course of business to convey the goods to the shore. . . . Landing goods means putting them upon the land, or upon that which by custom of the port is its equivalent. . . .

(At page 356) Cargo discharged into lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that by taking delivery short of the shore the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing and himself terminates the risk by taking delivery short of the land. . . .

Appeal dismissed.

THE "INCHMAREE" (s), HAMILTON *v.* THAMES AND MERSEY MARINE INSURANCE COMPANY (1887)

APPEAL CASES, New Series, vol. xii., HOUSE OF LORDS,
page 484.

Marine Insurance—Perils of the sea and all other perils, etc.—Perils insured against—Words "ejusdem generis"—General words—Injury to donkey-engine.

A steamer insured by a time policy in the ordinary form on the ship and her machinery, including the donkey-engine. For the purposes of navigation the donkey-engine was being used in pumping water into the main boilers, when owing to a valve being closed which ought to have been kept open, water was forced into and split open the air-chamber of the donkey-pump. The closing of the valve was either accidental or due to the negligence of an engineer, and was not due to ordinary wear and tear:

Held, reversing the decision of the Court of Appeal, that whether the injury occurred through negligence, or accidentally without negligence, it was not covered by the policy, such a loss not falling under the words "perils of the sea," etc., nor under the general words "all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the subject-matter of the insurance."

West India and Panama Telegraph Co. v. Home and Colonial M. I. Co., disapproved.

LORD HERSCHELL (at page 493): "My Lords, this action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy."

(After stating the facts his Lordship proceeded) "It was not

contended at the bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words: 'All other perils, losses, and misfortunes, etc.'

"It cannot be denied that, if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that the general words following a specific enumeration must be limited to perils *ejusdem generis* with those specified, or, to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur: viz. a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. . . ."

"I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the Courts, for a long series of years, a construction to which your Lordships would do well to adhere."

(His Lordship then reviewed the authorities, commencing with the case of *Cullen v. Butler* (1816), 5 M. & S. 461, in which Lord Ellenborough C.J. delivered the judgment of the Court as to the meaning of the words in question; quoting the judgment as to "The extent and meaning of the general words," etc. (at page 465), and stated that no case had been cited at the bar from the date when this opinion was expressed which had proceeded upon a construction of the policy different from that enunciated by Lord Ellenborough, unless it was the recent case of *West India and Panama Tgph. Co. v. Home & Colonial Mar. Ins. Co.*)

(At page 498) "I think, therefore, that the case now before your Lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by Lord Ellenborough; that is, whether it is a case 'of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes.' When the facts are borne in mind it seems necessary only to state the question in this way to see that the answer must be in the negative. To which of the specially enumerated perils is it similar? The only one that could be suggested is 'perils of the seas.' . . .

"It is, I think, impossible to say that this is damage occasioned by a cause similar to 'perils of the sea' on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to marine damage. By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance."

(His Lordship then considered the judgment in the case of the *West India Co. v. Home and Colonial Co.*, stating that he did not agree with the reasoning on which judgment was based in that case.)

(At page 500) "Upon the whole I have come to the conclusion that the judgment of the Master of the Rolls in the Court below is correct. I believe it to have been not only in accordance with the authorities, but in harmony with the common understanding of

those who enter into contracts of marine insurance. Several instances were put in the course of the argument, of disasters which are of common occurrence, and which would seem to be just as much within the general words as that which is now in question, but in respect of which it has never been suggested that the underwriters were liable. I accordingly concur in the judgment which has been moved."

Lords Halsbury L.C., Bramwell, and Macnaghten delivered judgments to the same effect.

INMAN *v.* BISCHOFF (1882)

APPEAL CASES, vol. vii., HOUSE OF LORDS, page 670.

Insurance—Freight—Loss—Perils of the sea—Causa proxima—Charter-party—Condition precedent.

A ship was chartered for time on monthly hire; the charterers agreeing to pay the freight during employment and efficient performance of the service, and the shipowner covenanting that the ship should be seaworthy during the continuance of the charter; provided that if at any time it should appear to the charterers that the ship became inefficient, it should be lawful for them to put her out of pay, or to make such abatement by way of mulct out of the hire or freight as they should adjudge fit. The owner effected a time policy of insurance on freight outstanding. During the time the ship became inefficient through perils of the sea, and the charterers refused to pay freight after that date. The owner having brought an action on the policy:

Held, affirming the decision of the Court of Appeal, that on the true construction of the charter party the efficiency of the ship was not a condition precedent to the earning of the freight; that the pecuniary loss was caused by the charterers availing themselves of the abatement clause; and not by the perils of the seas; and that the underwriters were not liable.

Employment of vessel as Government transport on monthly hire for three months certain subject to the following proviso: "That if at any time . . . the said ship had become incapable from any defect, deficiency . . . or from any cause whatsoever, to perform efficiently the service contracted for, then . . . it should be lawful for the said Commissioners to put the said ship out of pay, or to make such abatement by way of mulct out of the hire . . . as they should adjudge fit and reasonable." A policy was effected on "freight outstanding from 20th February to 19th May 1879 inclusive. During service under the Charter-party, on the 21st March 1879, the vessel struck a rock and became inefficient, and on the 17th April 1879 was discharged from service, having been retained until then for removal of stores. The vessel was repaired and tendered for service to the Government, but was refused, and claim was made on the policy for two months' hire—the first month's hire having been paid in advance.

LORD WATSON (at page 686): "My Lords, the terms of the policy of the 22nd February 1879 appear to me to be sufficient to include freight to be earned under a time charter. And, seeing that the respondents when they accepted the insurance had notice that the *City of Paris* was under a contract of Charter-party, I am of opinion that the policy attached to the freight therein stipulated, whether

they did or did not choose to inform themselves of the particulars of the contract, and, consequently, that the respondents became liable for such part of that freight as might be lost through any of the risks insured against during the period covered by the policy. . . .

"There are two facts in the present case which have not been disputed. The first of these is that the injury sustained by the vessel in Simon's Bay, and her consequent detention there whilst undergoing necessary repairs, were due to perils of the seas within the meaning of the policy. The second is that the Commissioners of the Admiralty, who were the charterers, have not paid, and refuse to pay freight subsequent to the 21st March 1879." . . .

(After examining the terms of the Charter-party, and stating that the facts of the case were such as did not bring it within the principle of *Jackson v. Union Marine Insurance Co.*, the judgment proceeds at page 690) "If I am right in my construction of the Charter-party the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risks insured by the policy; and if it had been expressly stipulated in the Charter-party that freight should cease to be payable as long as the ship was incapable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight through perils insured against. But that is not the present case. The abatement of freight is not, in my opinion, necessarily dependent upon the fact that the vessel has been disabled by sea risks. It is entirely dependent upon the discretion of the Commissioners of the Admiralty, who are not limited in the exercise of that discretion, to considerations arising out of the casualty which has occasioned delay. They may quite legitimately take into account, in determining whether they will or will not inflict a mulct, the conduct of her owners under a totally different contract of Charter-party, and many other considerations equally foreign to the ship or freight insured. In these circumstances, whilst I am conscious that the question is one of great nicety, I am unable to regard a disallowance of freight, which may be legitimately made on such considerations, as lost freight in the proper sense of that term. It appears to me that the deduction from freight which the Commissioners are empowered to make is in truth and substance a penalty imposed upon the shipowner, which they are entitled to levy out of the freight retained in their hands.

"I am of opinion that the judgment of the Court of Appeal ought to be affirmed."

Lords Selborne L.C., Blackburn and Fitzgerald delivered judgments to the same effect.

IONIDES *v.* PENDER (1874)

Q.B. vol. ix., page 531.

Over-valuation—Disclosure.

Upon effecting a policy of marine insurance the assured is bound to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act.

Where, therefore, in an action on a policy of marine insurance, it appeared that the plaintiffs had insured the goods at a value

very greatly over their real value, without disclosing the over-valuation to the underwriter; and it was proved in evidence that underwriters do, in practice, act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative:

Held, that the practice is rational; and that it was proper to leave to the jury whether the valuation was so excessive, and whether it was material to the underwriter to know of such over-valuation.

The judgment of the Court (Blackburn, Lush, and Archibald JJ.) was delivered by BLACKBURN J. (at page 532).

(At page 537) ". . . The finding of the jury, that the concealment was material, was impeached, both on the ground that it was against evidence and of misdirection; as it was contended that the judge ought to have told the jury that the fact of an excessive valuation was not one which the assured was bound to disclose.

"It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts, and that a concealment of material fact, though made without any fraudulent intention, vitiates the policy. In Duer on Insurance, vol. ii. p. 388, it is said: 'The terms in which the general rule is usually stated are, that it is the duty of the assured to communicate all facts that are material to the risks and which are not known or presumed to be known to the underwriters; but these terms are ambiguous, and the first and necessary inquiry is, by what criterion the materiality of the facts alleged to have been concealed is proper to be determined. Is the obligation of a disclosure limited to the facts that are material to the risks considered in their own nature? Or does it extend to all that may be deemed material by the insurer and would probably influence his ultimate decision?' He admits that a knowingly false representation of a matter which, though extraneous to the risks, may affect the judgment of the underwriter will vitiate; and that the case of *Sibbald v. Hill* is an express decision of the House of Lords to that effect. But he lays it down as being 'the most reasonable opinion . . . that those facts only are necessary to be disclosed which, as material to the risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider.' The cases and proofs in support of his position are collected by Duer at p. 518.

"It was argued before us that the nature of the risk (that is to say, the strength and seaworthy qualities of the *De Capo*, and the probability of encountering storms on the voyage, and so forth), was not in the least affected by the amount at which the goods were valued, which is no doubt true. The underwriter is not answerable for any loss occasioned by fraud of the assured, and it was argued, that therefore the objection which an underwriter might have to take a risk on account of the temptation which the assured might have to make away with the venture, ought not to be taken into account. Whether Duer would have gone so far as this is not clear; but if he would, the Courts in America have refused to follow him; see the case of *New York Bowery Fire Insurance Co. v. New York Five Insurance*. . . .

"It is to be observed that the excessive valuation not only may lead to suspicion of foul play, but that it has a direct tendency to make the assured less careful in selecting the ship and captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss as far as possible, and cannot, therefore, properly

be called altogether extraneous to the risks ; but we would scarcely base our judgment on so special a ground.

" We agree that it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in Parsons on Insurance, vol. i. p. 495, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one. We do not think any of the cases cited by Duer are in contravention of it ; and applying it to the present case, there was distinct and uncontradicted evidence that underwriters do in practice act on the principle that it is material to take into consideration whether the over-valuation is so great as to make the risk speculative. It appears to us a rational practice. We think, therefore, that the judge could not do otherwise than leave this question to the jury ; and that their verdict was not against the weight of evidence and should not be disturbed."

IONIDES *v.* UNIVERSAL MARINE INSURANCE
COMPANY, LIMITED (1863)

LAW JOURNAL, vol. xxxii., COMMON PLEAS, page 170.

The plaintiffs effected a policy of insurance on 6500 bags of coffee " warranted free from capture, seizure, and detention, or any attempt thereat, and free from all consequences of hostilities, riots, and commotions." At the time the vessel set out on her voyage from Rio de Janeiro to New York, a war was raging between the Northern and Southern States of the United States of America, and as an act of hostility, persons in the military service of the Southern States had extinguished a light which had up to that time been kept burning at a lighthouse at Cape Hatteras. The captain, from ordinary causes, got out of his reckoning, and in consequence ran ashore on Cape Hatteras. If the light had been burning, the captain would have seen it and could have avoided the damage. When the ship went aground she was boarded by two officers in the military service of the Southern States with some show of taking possession of her and her cargo. Certain persons, acting in the employ of the Northern States as salvors, then commenced taking the cargo out of the ship ; they took out 120 bags, when the soldiers of the Southern States again interfered and prevented more being taken out. If this interference had not taken place 1000 bags in addition to the 120, but not more, could have been saved. From the first there was no hope that the ship could be got off :

Held, that the insurers were liable for a partial loss. That as the 1000 bags would have been saved but for the direct act of the soldiers, the loss of these was covered by the exception. But that for the loss of the remainder the insurers were liable, as they were lost by perils of the sea and the putting out the light, though an act of hostility was too remotely connected with the loss to be considered as the cause of it, and so bring it within the exception.

Held, also, that if a ship and cargo be reduced to such a state by the perils of the sea, as that there is no hope of recovery, but while they still exist in specie, they are nominally taken possession of by

persons in the military service of a belligerent State, this is a loss by perils of the sea and not by capture.

ERLE C.J. (at page 173): "In this case the result is, in my opinion, that we ought to give our decision in favour of the plaintiff in respect of a partial loss. This was an action upon a policy of insurance upon coffee, and the policy contained this clause of exception: 'Warranted free from capture, seizure, detention and all the consequences thereof, and of any attempt thereat and free from all the consequences of hostilities, riots and commotion.' It turns out that the insured ship, with a cargo of coffee on board, in proceeding from Belize¹ to New York, had to pass by Cape Hatteras. What the captain intended was to steer north-east till he had rounded the Cape, and then to steer due north to New York; but he got out of his reckoning, and when he was thirty miles south of the Cape, and ten miles westward of it, thought that he had passed it. The consequence was that turning to the north too soon he ran ashore.

"If there were nothing more in the case, it would be a clear loss by perils of the sea; but there is this further fact to be taken into consideration, that at Cape Hatteras there had been maintained, until the secession of North Carolina from the United States, a lighthouse, and when at the outbreak of the present war in America, North Carolina seceded and sided with the Confederate States, the light at Cape Hatteras was put out for a hostile purpose; the Federal ships being likely to suffer from the want of the light if they had to pass Cape Hatteras.

"I also take as a fact for the purpose of this judgment that, if there had been a light on Cape Hatteras, the Captain could have seen it and could have put his ship about, and if he could have seen it and could have put his ship about, that the ship would not have been lost in the manner in which it was.

"Now the grand contention upon the first part of the case is, whether the loss of the ship was a loss caused by the consequences of hostilities within the meaning of this policy. I quite agree with the learned counsel who have argued the case on both sides that it is a question of construction; and that the intention of the parties is to be gathered from the words in the instrument with the surrounding circumstances. The words are not so usual as to have been the subject of judicial interpretation before, and it is my duty at the present moment to put that construction upon them which I think the parties to the instrument intended. I quite agree with the learned counsel who in the course of the argument have either affirmed or conceded that these words are to be construed in the same way as if the assured had reassured his cargo against those perils which are excepted in the warranty that we are now to construe. . . .

"The words are to be construed with reference to the known principle pervading insurance law, *causa proxima, non remota spectatur*. The relation of causation is a matter that cannot be often distinctly ascertained; but if, in the ordinary course of events, the one antecedent is constantly followed by the other sequence, they may be taken to stand in common parlance, in the relation of cause and effect.

"Now in the present case, were the putting out of the light and the loss of the ship so connected together as to stand in that relation in the ordinary course of events? I think they were too distantly connected with each other to stand in that relation.

¹ [Sic] but *quaere* Rio.

" I will put an instance of what I consider a consequence within the meaning of this policy. Supposing there was a hostile attempt at the seizure of the ship, and the enemy was to follow the ship, and the ship to escape seizure was to run aground or to run ashore, the loss would then be caused by the attempt at seizure, and it would be within the exception.

" I will suppose again that the enemy gave chase to the ship for the purpose of seizing her, and to avoid being seized she got into a bay where there was neither anchorage nor port, and the wind on shore; and where if the wind so continued it was physically certain that she must be lost, I should say that the ship, being driven on shore by the wind under those circumstances, was lost by the consequences of an attempt at seizure, and that it would be within the exception. . . .

" I will suppose a third case, that is, that the wind did change, and that the ship got out of the bay and proceeded on her voyage, and afterwards in the course of the voyage was overtaken by a storm, which she would have avoided by having arrived at her port, if she had not been obliged to deviate and delay by reason of the attempt at seizure. If she foundered in the storm, there would be then a loss which never would have occurred if there had not been the attempt at seizure. But the loss would not be connected with that attempt in that proximate relation which, in the ordinary course of events, is necessary to connect the loss with what is called the cause of the loss. The ship going out of the bay and proceeding on her voyage, it is not a sequence in the ordinary course of events that if a storm should overtake her she should sink in the course of that storm. I suppose, as a fact found in the case, that if she had not been obliged to deviate, she would have been safe in port before the storm came on. Then I should say that, although the consequence of the attempt at seizure was the cause without which the loss never would have happened, yet it is not the *efficient* cause of it, in the language used in some of the cases analogous to this, or the *proximate* cause of it, in the language of some other cases. The one fact is too remote from the other to call it a loss by the consequences of hostilities, and, therefore, it would be a loss by perils of the sea.

" Take another instance. The warranty extends to loss from all consequences of hostilities. I will assume that the ship is destined for a port where there are two channels of entrance. In one of those channels there is a torpedo which has been laid down for hostile purposes, in the other there is none. If the master of the ship coming into the port knows nothing of the torpedo and the ship is sunk and destroyed, there, of course, the consequence of hostilities leads directly to the destruction. The hostilities having induced the occupiers of the port to lay down the torpedo, if the ship struck on it and was destroyed, this is the consequence of hostilities, which are the proximate cause of loss, and so the loss is within the exception. But suppose the master is aware that the torpedo is there, and for the purpose of avoiding the torpedo he takes the other channel, and from bad navigation the ship runs aground there, and is lost. In my opinion that would be a loss not within the exception, because by good navigation she might have passed through safely. I should say that the ship so lost would be lost by the perils of the sea, within the meaning of the policy.

" Now let us apply these considerations to the present case. The

captain had missed his reckoning, and either not having a sufficient look-out, by which he would have seen the breakers ahead when he was coming towards the shore, or not lying-to in the night, when he doubted of his position, he runs on shore. And it is not in my opinion the absence of the light which proximately causes the running on shore within the meaning of marine policies. It would therefore follow that the wreck of the ship is not within the exception, but is within the policy; and if the wreck of the ship brought about the loss of the cargo, the insurer of the cargo is, so far, to be considered liable.

"But then follow the subsequent events. The ship struck on the Tuesday night. On the Wednesday the weather was too rough to save the cargo. On the Thursday the weather was smooth enough and considerable part might have been saved. One hundred and twenty bags were saved, and 1120 might have been saved, but that the Confederate troops came down and interfered with the officers of the Federal Government, who had the duty to save the cargo, and who were salvors in fact though they are called wreckers.

"No doubt when the ship was wrecked at first, and there was no appearance of being able to save any of the cargo, there was presumably a total loss of the cargo. But when the course of events showed that the ship had not gone to pieces, and there was a part of the cargo at least that could have been saved, then the presumption of a total loss ceased. When a part of the cargo was actually saved, of course, that presumption was demonstrated not to apply to that, and I take it to be found as a fact that 1000 bags more could have been saved but were prevented from being saved in the manner I have mentioned. Those 1000 bags, as between the parties to this instrument, must be taken to have been, if I may say so, potentially saved, and they would have been saved, but that saving was prevented by the consequences of hostilities and commotion. That being so, those 1000 bags were brought within the exception in this policy, so that, with respect to them, the loss was a loss for which the underwriters are not liable; . . . but for 5380 bags the insurers are liable, for to that extent it appears to me there was a partial loss within the meaning of this policy. . . . But it appears to me that none of the authorities apply to the case that is now before the Court. It appears to me that the ship was in a state of wreck; that the cargo was in the nature of wreck; and that the act of the troops, in all that they did on the wreck in relation to the cargo, was the act of collecting what they could despoil from the wreck for themselves, and by no means the act of troops taking possession of a ship or of a cargo in the capacity of troops making a capture.

"I think, therefore, that the verdict ought to be for the plaintiff for the value of the 5380 bags, the loss of which in my opinion was covered by the policy."

Willes, Byles, and Keating JJ. delivered judgments to the same effect.

IRVING *v.* MANNING (1847)

HOUSE OF LORDS CASES, vol. i. page 287.

Valuation—Constructive total loss of ship.

A vessel is totally lost, within the meaning of a policy, when it becomes as a ship of no use or value to the owner, and is as much

lost as if it had gone to the bottom of the sea or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck. A loss is also to be considered as total where a prudent owner, if uninsured, would not have repaired. In a valued policy the agreed total value is conclusive. A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages.

A ship was insured in a policy, in which the value was stated at £17,500. The ship was injured by storms, was surveyed, and the repairs were estimated at £10,500. When repaired the vessel would have been of the marketable value of £9000. The assured abandoned and claimed as for a total loss. The jury found that under the circumstances existing in the case a prudent owner uninsured would not have repaired the vessel :

Held, by the Lords, affirming the judgment of the Court below; that the assured could recover as for a total loss.

The judges were summoned and attended their Lordships when the Lord Chancellor moved that the following question be put to them, "whether in the judgment upon the special verdict in this case, the damages ought to be taken on property assessed at £3000 or at £1500?"

PATTERSON J. (at page 304): "I am desired by the judges, who heard the whole of the argument at your Lordship's bar, to give their answer to this question, and to state their opinion that the plaintiff below was entitled to recover, upon the facts found by the special verdict, the sum of £3000.

"Upon the record it appears that the action was on a policy for £3000 on a ship valued at £17,500. The other facts formed by the special verdict show that it was fairly valued at that sum (and, indeed, it would be assumed that it was so, unless fraud had been pleaded and proved), and then it is found that the vessel during the voyage was so damaged as to be incompetent to proceed without repairs; that the necessary expenditure in order to repair and make it seaworthy would have amounted to £10,500, and that the ship would have been then worth £9000 only, which was its marketable value then, and at the time of the policy; that a prudent owner uninsured would not have repaired the vessel; and that it was duly abandoned to the underwriters.

"If this had not been the case of a valued policy it is clear that on the facts found there was a total loss; for a vessel is totally lost, within the meaning of the policy, when it becomes of no use or value as a ship to the owner, and is as much so as if the vessel had gone to the bottom of the sea, or had been broken to pieces, and the whole or great part of the fragments had reached the shore as wreck; and the course has been in all cases in modern times to consider the loss as total where a prudent owner uninsured would not have repaired.

"In an open policy, therefore, the assured would have been entitled to recover for a total loss, the amount to be ascertained by evidence. What difference then arises from the circumstance that the policy is a valued policy?

"By the terms of it, the ship, etc., for so much as concerns the assured, by agreement, between the assured and assurers, are, and shall be, rated and valued at £17,500, and the question turns upon the meaning of these words.

" Do they, as contended for by the plaintiff in error, amount to an agreement that for all purposes connected with the voyage, at least for the purpose of ascertaining whether there is a total loss or not, the ship should be taken to be of that value, so that when a question arises whether it would be worth while to repair, it must be assumed that the vessel would be worth that sum when repaired ?

" Or do they mean only, that for the purpose of ascertaining the amount of compensation to be paid to the assured, when the loss has happened, the value shall be taken to be the sum fixed, in order to avoid disputes as to the quantum of the assured's interest ?

" We are all of opinion that the latter is the true meaning ; and this is consistent with the language of the policy, and with every case that has been decided upon valued policies."

His Lordship then referred to the principle laid down in the case of *Lewis v. Rucker* for ascertaining the liability of the policy on goods for a partial loss, and continued (at page 306) : " Now the question whether a loss is total or partial is a question of the same nature as the question, what is the extent of a partial loss ? And there is the same reason in both cases for excluding the consideration of the value in the policy from the inquiry as to the extent of the loss, and for treating that value as binding on the question of how much the subject so totally or partially lost was worth ; so that the mode of determining the question, whether the loss was total or not, which has been adopted in this case, agrees, in so far as it excludes the consideration of the value in the policy, with that in which the inquiry into the extent of a partial loss on goods is always conducted. Such has been the construction put upon valued policies in the cases which are questioned in this writ of error: *Allen v. Sugrue* [1828], *Young v. Turing* [1841]; and *Egginton v. Lawson* [1832]; and *Herne v. Hay* [1842], cited by Sir F. Thesiger. Those cases have now been considered, for many years, as having settled the law, and have been the basis on which contracts without number have been formed, and they ought not on slight grounds to be departed from. The principle laid down in these latter cases is this, that the question of loss, whether total or not is to be determined just as if there was no policy at all ; and the established mode of putting the question when it is alleged that there has been, what is perhaps improperly called, a constructive total loss of a ship, is to consider the policy altogether out of the question, and to inquire what a prudent owner uninsured would have done in the state in which the vessel was placed by the perils insured against.

" If he would not have repaired the vessel it is deemed to be lost.

" When this test has been applied, and the nature of the loss has been determined, the quantum of compensation is then to be fixed.

" In an open policy the compensation must be then ascertained by evidence.

" In a valued one, the agreed total value is conclusive ; each party has conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in case of a total loss.

" It is argued that this course of proceeding infringes on the generally received rule that an insurance is a mere contract of indemnity, for thus the assured may obtain more than a compensation for his loss ; and it is so.

" A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification that the parties may agree beforehand in estimating the value of the subject insured, by way

of liquidated damages, as indeed they may in any other contract to indemnify."

Judgment affirmed with costs.

JACKSON *v.* UNION MARINE INSURANCE COMPANY

COMMON PLEAS (1873), vol. viii. page 572.

Marine Insurance—Loss of freight—Right of charterer to throw up charter-party where vessel disabled.

Plaintiff, on 9th November 1871, effected an insurance "on chartered freight" valued at £2900, at and from Liverpool to Newport, in tow whilst there, and thence to San Francisco. The ship left Liverpool on 2nd January 1872, and on the 4th before arriving at Newport took the rocks in Carnarvon Bay. She was got off much damaged, and returned to Liverpool on 12th April, where she was sold under circumstances which the Court held not to be justifiable; there being no satisfactory evidence of a constructive total loss. By the charter-party the vessel was to proceed with all convenient speed (dangers and accidents of navigation excepted) from Liverpool to Newport, and then load a cargo of steel rails for San Francisco. After the vessel took the rocks, and before she was got off, viz. on 15th February, the charterers threw up the charter, and on the following day hired another ship to carry the rails (wanted for railway construction) to San Francisco. Plaintiffs sued for loss of chartered freight. The jury found that the time necessary for getting the ship off and repairing her was so long as to make it unreasonable for the charterers to supply the agreed cargo at the end of such time, and so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowners and the charterers:

Held, by Keating and Brett J.J., that the charterers were absolved from loading the vessel, and that the shipowner therefore might recover for the loss of freight.

Held, contra by Bovill C.J., that the charterers were not entitled to throw up the charter, and that consequently the plaintiff could not recover against the underwriters, and that the findings of the jury were immaterial.

BRETT J., in whose judgment Keating J. concurred (at page 577): "The question then is whether, assuming the findings of the jury to be correct; there was a loss of freight by perils of the sea. That question divides itself into two; first, did the injury to the ship, caused as it undoubtedly was by a peril of the sea, make it impossible for the shipowner to earn the chartered freight? Second, if it did, does such impossibility so caused amount to a loss by perils of the sea within the meaning of a freight policy on chartered freight? The first question depends upon what were the rights under the circumstances of the plaintiff and the charterers under the charter-party; the second upon the rights of the plaintiff and the defendants under the policy.

"As to the first the question is whether upon an injury happening to a chartered ship in the voyage preliminary to that on which the chartered freight is to be earned, happening before the charterer has received any advantage from the contract, where the injury is caused by a peril excepted in the charter-party, where it is caused without default of the shipowner, where he has not been wanting in

due diligence to arrive at the appointed place of loading, but where the injury is so great as to prevent the arrival of the ship or her presentation to the charterer in a fit state to carry cargo within a reasonable time, having regard to the business of the charterer, or within any time which could have been, at the time of making the contract, in the contemplation of either the charterer or shipowner, as a time in any way applicable to the commercial speculation of either of them—the question is whether the contract is not at an end, in the sense that neither party to it can enforce any obligation under it against the other. In other terms the question may be stated to be whether in such a contract there is not an implied stipulation that the shipowner cannot upon the happening of such extensive damage to the ship, though without default of his, compel the charterer to supply at so remote a date a cargo, and that the charterer, conversely, cannot compel the shipowner at so remote a date to tender his ship, the reason being that the contract is not applicable and could not in the mind of either party be applicable, at the time of making it, to the earning of freight either by the shipowner, or the charterer by reason of the transport of goods at so remote a period under mercantile contingencies, and on mercantile considerations which must be absolutely different from and unconnected with any consideration then before them. There being no stipulation that the ship should be at Newport at any fixed date . . . there is no condition precedent that she should be there at any given time."

After reviewing the authorities as to the position of the ship-owner and charterer, the judgment proceeds at page 581:

"These authorities seem to support the proposition which appears on principle to be very reasonable, that where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.

"In such a state of things arising under a charter-party such as the charter-party under discussion, where no benefit of any kind has accrued to the charterer, the shipowner has lost his power of earning any part of the chartered freight. The immediate cause of such a loss is the extent of injury caused to the ship by a peril insured against under the policy during the voyage thereby insured. Such a loss is therefore a loss caused by a peril insured against within the policy on freight.

"For these reasons in the action on the policy on freight the rule must be made absolute to enter the verdict for the plaintiff for a total loss."

BOVILL C.J. was of opinion that no particular date of arrival being agreed on, the risk of non-arrival always rests with the charterers; if without default of the owners the arrival is so delayed as to prevent loading at the usual time, or so as to be unprofitable to the charterer, he must provide in the contract for that contingency, otherwise he must fulfil the contract, and load and carry it out. If the charterers were not entitled (and he thought they were not) to throw up the charter, then the remedy of the plaintiff for freight was against them. The probable delay was provided for and excepted by the express terms of the charter-party.

JOHNSON *v.* SHEDDON (1802)

2 EAST, page 580.

Particular Average on Goods to be adjusted on Gross Values.

LAWRENCE J.: "This is a motion for a new trial. . . . And the ground on which the new trial has been moved for is that Mr. Oliphant has proceeded in his calculation upon a mistake, inasmuch as in estimating the loss he has taken for his foundation the difference between the net produce of what the goods have produced and what they would have produced if sound; instead of the difference between their respective gross produces. . . . Some points are agreed on both sides, viz. that the loss is to be estimated by the rule laid down in *Lewis v. Rucker*, 2 Burr, page 1170, that the underwriter is not to be subjected to the fluctuation of the market; that the loss for which the underwriter is responsible is that which arises from the deterioration of the commodity by sea damage; and that he is not liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination. In *Lewis v. Rucker*, Lord Mansfield says: 'where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantum of damage; but if you can fix whether it be a third, a fourth, or a fifth worse, the damage is fixed to a mathematical certainty.' And this, he says, is to be done 'by the price at the port of delivery.' From hence it follows that whatever price at the port of delivery ascertains whether a commodity be a third, fourth, or a fifth the worse, is a price to which he alludes. And this deterioration will be universally ascertained by the price given by the consumer or the purchaser, after all charges have been paid by the person of whom he purchases; or, in other words, by the difference of the gross produce, and not by the difference of the net produce. When a commodity is offered to sale by¹ one who has nothing further to pay than the sum the seller is to receive, it is the quality of the goods which in forming a fair and rational judgment can alone influence him in determining him what he shall pay: he has nothing to do with what it may have cost the seller; and the goodness of the thing is the criterion which must regulate the price; for being liable to no other charges he has only to consider its intrinsic value; and therefore if a sound commodity will go as far again as a damaged commodity by having twice its strength, or by being in any other respect twice as useful, he will give twice the money for the sound that he will for the damaged, and so in proportion. To say that this is not the rule will be to assert, what I conceive it will be difficult to prove, that the market price of things is not proportioned to their respective values; and if it be, it is a means of ascertaining whether a commodity be a third, a fourth, or a fifth the worse by any risk it may have met with; and the damage will be thereby ascertained in the degree pointed out in *Lewis v. Rucker*; and the underwriter who shall pay by this rule, will pay such proportion or *aliquot* part of the value in the policy as corresponds with the diminution in value occasioned by the damage. Lord Mansfield, in laying down the rule, speaks of the price of the thing at the port of delivering as the means of ascertaining the damage: by which he must mean the whole sum which is to be paid for the thing. Lord Mansfield cannot mean the price before

¹ *Sic*, but the sense demands "for sale to."

the mast, leaving the purchaser liable to the payment of further sums, for such payment is in effect but a part of the price: it is not an equivalent for the thing sold: for if the purchaser were not liable to the duties and the charges, he would give as much more as the amount of those charges comes to. The price of a thing is what it costs a man; and if in addition to a sum to be paid before the mast other charges are to be borne, that sum and the charges constitute the cost. It is not necessary that the whole price should be paid to one person. To taking the net proceeds to calculate by there are several objections; one is, that by taking the net proceeds as the basis of the calculation instead of the gross proceeds, it will happen, where equal charges are to be paid on the sound and damaged commodity, that the underwriter will be affected by the fluctuation of the market, which he ought not to be. This is obvious from considering that if you take equal quantities from two unequal quantities, the smaller such unequal quantities are, the greater will be the difference between the remainders, *e.g.* suppose sound goods including all charges to sell for £600, damaged for £300, let the charges on each be £100, the difference after they are deducted will be £300 or three-fifths. But let the goods come to a fallen market with the same degree of deterioration, and let the sound sell for £300 and the damaged for £150, and deduct from each the charges, the net proceeds of the sound will be £200 and of the damaged £50, and the differences will be three-fourths. But as the deterioration is the same in both cases, the underwriter should pay the same, whatever the state of the market; which he will do if the gross produce be taken, *scil.* half the valued or invoice price. Another consequence of taking the net product will be, that you will make the underwriter responsible for a loss not arising from the deterioration of the commodity by sea damage; but for that loss which the assured suffers from being liable to pay the same charges on the sound and damaged commodity. This will be illustrated by the case put of two ships arriving with the same commodity equally damaged; one being subject to duties and charges, and the other to none, the degree of deterioration being supposed the same, the underwriters should pay alike in both cases. Suppose then the cargoes to be deteriorated half, that the demand for the commodity and the state of the market is the same, and that the goods if sound would sell for £1000, but being damaged for £500, and the charges to be £200.¹ On those goods where no charges are to be paid the insurer will have to pay 50 per cent. The goods on which charges are to be paid being equally good with the other will sell in the market for the same sum, and when the charges are deducted, if sound, will produce £800, but being damaged after the same deduction will produce only £300; and according to that calculation if the underwriter were to pay he would pay five-eighths instead of four-eighths or one half; not because the one cargo has suffered more than the other by the sea, for the supposition is that the sea damage is the same in both, but from commodities of unequal value being subjected to equal duties and charges. Suppose the same goods sold before the mast; a purchaser for those not liable to the duties would give exactly what he would give if there had been duties which the seller had paid for as he has nothing further to pay him, it is just the same whether the seller had no charges to pay or whether there were charges which he has paid;

¹ Corrected from '£2000' as in Report, obviously an error.

the commodity in the one case and in the other comes to the buyers' hands in the same state. But on these goods if liable to the further charges, he could give, if sound, but £800, as the duties he would have to pay would make the whole cost £1000; and if damaged, and liable to the same charges, he could give but £300, for as he would be liable to pay £200 in charges, if he were to give above £300, the whole amount of what he would ultimately pay for the damaged goods would exceed their value, which by the supposition is but £500: he would, therefore, in this case, give for the damaged less than in proportion to its degree of deterioration; for in giving £300 he would only give three-eighths instead of four-eighths or a half; not because the damaged commodity is not half so good as the sound, but because on such damaged commodity he must pay as large charges as on the sound; and as this loss to the assured arises from a purchaser not being able to pay in proportion to the intrinsic quality of the commodity, it shows that a sale before the mast, when equal duties are to be paid, does not correspond with the deterioration of the commodity nor ascertain whether it be a third, fourth, fifth, or in what degree worse than the sound; consequently, that the difference of the net produce cannot be the rule to calculate by where the charges are not proportioned to the respective values of the sound and damaged commodity. Another objection is, that if the net produce be taken it may happen that you can have no data to calculate by; which will be the case if the gross produce of the sound commodity should only pay the charges, and leave no net proceeds; for then there can be no difference between the net proceeds of the sound and damaged in proportion to which it is contended that the underwriter is to pay. Upon the whole of this case it is our opinion that the rule should be absolute for a new trial."

KALTENBACH *v.* MACKENZIE (1878)

COMMON PLEAS DIVISION, vol. iii. page 467, COURT OF APPEAL.

Abandonment and notice of abandonment—Proper time for notice.

Where the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound in order to enable him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriter, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is justifiably sold.

Action on a policy of insurance to recover a salvage loss of £94:11s. per cent under a Lloyd's policy for £4000 on the ship *Amiral Prolet* for six calendar months from the 4th October 1870.

At the trial before Lord Coleridge C.J. during the Hilary Sittings, 1877, in London, the following facts were proved:

The plaintiff is a merchant residing at Zürich and a partner in the firm of Kaltenbach, Engler & Co. trading at Singapore and Saigon, and the registered owner of the *Amiral Prolet*. The defendant is an underwriter at Lloyd's, and subscribed the policy on the *Amiral Prolet* for £100. On 14th January 1871 the *Amiral Prolet* sailed from Saigon with a cargo of rice for Hong-Kong. On 22nd January while on that voyage she struck on the Britto Bank. She was got off the same day and brought back to Saigon on 24th January. She was surveyed on 28th January and a further survey was

made on 3rd February when she was in dry dock. The surveyors reported that the expense of repairs would exceed the value of the ship when repaired, and they consequently condemned her as a constructive total loss. On 7th February she came out of the dry dock, and was anchored in smooth water, and there was no evidence to show that the vessel was in imminent danger of perishing, or that there was any immediate necessity for the sale. She was, however, by order of the Saigon firm on 23rd February sold by public auction for 1600 dollars. She was purchased by a Chinaman, repaired at an expense of 50 dollars, and sent down to Singapore, where she was resold. She was subsequently further repaired for about £500 and made a ship fit to carry dry cargoes.

On 7th February the Singapore firm wrote the master that he had better follow the advice of the surveyors and let the vessel be sold, and on 7th and 8th February sent copies of the Master's letters, giving particulars of the condition of the vessel and the advice of the surveyors, to the plaintiff.

On 27th February the Singapore firm wrote to the plaintiff's insurance brokers in London of the result of the surveys and the sale of the vessel, and to inform the underwriters of the facts.

It was alleged that notice of abandonment was given to the underwriters on 10th March.

At the close of the plaintiff's case it was contended on behalf of the defendant that the plaintiff could not recover for a constructive total loss, for the plaintiff had not given notice of abandonment. It was contended on behalf of the plaintiff that it was a question for the jury whether there was a constructive total loss; and if they so found, it was a further question for them whether, if the underwriter had received notice of abandonment, he could have taken any other course than that the plaintiff had adopted, or could have obtained any advantage from the notice of abandonment.

Lord Coleridge C.J. ruled that a notice of abandonment was a condition precedent to the plaintiff's right to recover and directed judgment of nonsuit to be entered.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the judge wrongly determined and misdirected the jury in holding that on the facts proved at the trial the plaintiff was not entitled to recover as for a total loss, and in holding and directing that as matter of law a notice of abandonment was necessary, and in withdrawing all questions of fact from the determination of the jury.

On argument the Court considered there was some evidence which ought to have been left to the jury and ordered a new trial.

The defendant appealed.

BRETT L.J.: "This case raises the questions of abandonment and notice of abandonment on a policy of marine insurance. Before I enter upon the merits of the case I think it desirable to state my view of the law.

"I agree that there is a distinction between abandonment and notice of abandonment, and I concur in what has been said by Lord Blackburn, that abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity, and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity. The doctrine of abandon-

ment in cases of marine insurance arises where the assured claims for a total loss. There are two kinds of total loss; one which is called an actual total loss, another which in legal language is called a constructive total loss. If there is anything to abandon, abandonment must take place; as, for instance, when the loss is an actual total loss, and that which remains of a ship is what has been called a congeries of planks, there must be an abandonment of the wreck. Or where goods have been totally lost, as in the case of *Roux v. Salvador*, but something has been produced by the loss, which would not be the goods themselves, if it were of any value at all it must be abandoned. But that abandonment takes place at the time of the settlement of the claim; it need not take place before.

"With regard to the notice of abandonment, I am not aware that in any contract of indemnity, except in the case of contracts of marine insurance, a notice of abandonment is required. In the case of marine insurance where the loss is an actual total loss, no notice of abandonment is necessary; but in the case of a constructive total loss it is necessary, unless it be excused. How, then, did it arise that a notice of abandonment was imported into a contract of marine insurance? Some judges have said it is a necessary equity that the insurer, in the case of a constructive total loss, should have the option of being able to take such steps as he may think best for the preservation of the thing abandoned from further deterioration. I doubt if that is the origin of the necessity of giving a notice of abandonment. It seems to me to have been introduced into contracts of marine insurance—as many other stipulations have been introduced—by the consent of shipowner and underwriter, and so to have become part of the contract, and a condition precedent to the validity of a claim for a constructive total loss. The reason why it was introduced by the shipowner and underwriter is on account of the peculiarity of marine losses. These losses do not occur under the immediate notice of all the parties concerned. A loss may occur in any part of the world. It may occur under such circumstances that the underwriter can have no opportunity of ascertaining whether the information he received from the assured is correct or incorrect. The assured, if not present, would receive notice of the disaster from his agent, the master of the ship. The underwriter in general can receive no notice of what has occurred unless from the assured, who is the owner of the ship or the owner of the goods, and there would, therefore, be great danger if the owner of a ship or of goods—that is the assured—might take any time that he pleased to consider whether he would claim as for a constructive total loss or not—there would be great danger that he would be taking time to consider what the state of the market might be, or many other circumstances, and would throw upon the underwriter a loss if the market were unfavourable, or take to himself the advantage if the market were favourable. These are the reasons why I think the assured and the underwriters came to the conclusion that it should be a part of the contract and a condition precedent that, where a claim is for a constructive total loss, there must be a notice of abandonment, unless there were circumstances which excused it.

"Notice of abandonment, therefore, being a part of the contract, questions arose as to the time when that notice should be given. The first question which arose was whether the notice must be given at the first moment the assured heard of the loss or at some subsequent period. It was, however, decided that it is not at the moment

of the first hearing of the loss notice of abandonment must be given, but that the assured must have a reasonable time to ascertain the nature of the loss with which he is made acquainted ; if he hears merely that his ship is damaged, that may not be enough to enable him to decide whether he ought to abandon or not ; he must have certain and accurate information as to the nature of the damage. Now, sometimes the information which he receives discloses at once the imminent danger of the subject-matter of insurance becoming and continuing a total loss ; as, for instance, if he hears his ship is captured in time of war, it must be obvious to everybody, unless the ship is recaptured, it would be a total loss ; or if he hears that the ship is stranded and her back is broken, although she retains her character as a ship, if he gets information upon which any reasonable man must conclude that there is very imminent danger of her being lost, the moment he gets that information he must immediately give notice of abandonment. The law that has been laid down is, that immediately the assured has reliable information of such damage to the subject-matter of insurance as that there is imminent danger of its becoming a total loss, then he must at once, unless there is some reason to the contrary, give notice of abandonment ; but if the information which he first receives is not sufficient to enable him to say whether there is that imminent danger, then he has a reasonable time to acquire full information as to the state and nature of the damage to the ship.

"But then there arose another question. Ships or goods, or the subject-matters of marine insurance, are liable to danger at various parts of the globe, where neither the assured nor the underwriter is present ; and upon the emergency the master of the ship, being there alone, must act. Now, under those circumstances masters have often sold either ship or goods ; and masters have had to consider whether they would sell the ship or goods even in cases where such ship or goods are not insured. The general rule with regard to the propriety of a master selling the ship or the goods, is that he has no right to sell either the ship or the goods without the consent of the owner, but if necessity arises the master becomes what is called, from the necessity of the thing, the agent to bind his owner by a sale, or to bind the owner of goods by a sale. Now, the rule, I should say from the necessity of things, at all events from the justice of things, is this, that if the circumstances are such that any reasonable person having authority from the owner would sell, then the master is entitled to sell, although he has not such authority. The question, I think, as between the person to whom a master sells and the owner of the property is, whether the circumstances were those which would have caused a reasonable owner, had he been present, to sell. If that state of things exists, the master has authority to sell, and his act is binding upon the owner of the ship or goods. Where, therefore, there has been a constructive total loss of either ship or goods, circumstances may have arisen which would justify the master in selling or they may not ; there may be a constructive total loss accompanied by a sale, and there may also be a constructive total loss without any sale. If the first information which the assured, not being present, has of the damage which has occurred to his ship or being the owner of goods of the damage which has occurred to his goods, although they were not an actual total loss by reason of the perils of the sea, is accompanied also by information that the master has sold, and if the circumstances of

that sale were justifiable so that the property passed to the vendee, under those circumstances that is the time when, if at all, the assured would be bound to give notice of abandonment; and in some of the earlier cases it was considered that even then the assured must give notice of abandonment, but in others that doctrine seems to be questioned. In *Rankin v. Potter* the law was established that where at the time when the assured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject-matter of the insurance has been sold so as to pass the property away, inasmuch as there was nothing of the subject-matter of the insurance which he could abandon, notice of abandonment was not necessary. No doubt the reason given for this was that notice at that time and under such circumstances would be a mere idle ceremony; it could be of no use. That was the point decided in *Rankin v. Potter*. In those particular circumstances it was held that notice of abandonment need not be given because there was nothing to abandon. That in one sense is true; but if goods had been sold it is obvious there must be something to abandon, that is the proceeds of the sale; the money which is the proceeds of the sale, when the insurance is settled, is abandoned; but where there is nothing of the subject-matter of the insurance to abandon, there is no ship to abandon, there are no materials of the ship to abandon, there are no goods to abandon, notice of abandonment under those circumstances was said to be futile. But *Rankin v. Potter* went no further; it did not decide—because the point was not raised—that if, at the time when the assured had to make up his mind and when otherwise he ought to abandon, there was no sale of the subject-matter of the insurance, the assured would be excused from giving notice of abandonment if he was able to show that, had he given such notice, in the result it would have turned out to be of no use. It was argued before us that the necessary inference to be drawn from *Rankin v. Potter* was, although there had been no sale of the subject-matter of the insurance when information of the disaster was received by the assured, yet if he could show that before any notice of abandonment could reach the underwriter and before the underwriter's orders could reach the assured, a sale could take place so that had the assured given notice of abandonment such notice would have been of no use to the underwriter, the assured would be excused from giving it. That point, however, is not raised here, and therefore it becomes unnecessary to decide it. I am not prepared to say that if it could be shown that the subject-matter of insurance, at the time when the assured has information upon which otherwise he would be bound to act, is in such a condition that it would absolutely perish and disappear, before notice could be received or any answer returned, that that might not excuse the assured from giving notice of abandonment, but I am prepared to say, that nothing short of that would excuse him; and although I do not say that what I have stated would excuse, I am not prepared to say it would not; that is the limit to which I think the doctrine could be carried, and it seems to me that to go further than that would let in the danger to provide against which the doctrine of notice of abandonment was introduced into the contract and made a part of the contract.

"Having stated my view of the law, I proceed to apply it. In the present case the ship was grievously injured and . . . I think we must take it that she had sustained damage to this extent,

that she was what is called a constructive total loss, that is to say, that she was in such a condition that the assured would be, if he fulfilled all other conditions, in a position to claim for a constructive total loss. We must not forget that the ship must be in a condition to justify what was done afterwards, otherwise the fact of sale or the fact of giving notice of abandonment had no effect whatever. A sale cannot make a total loss; notice of abandonment cannot enable the assured to recover for a total loss unless the sale was justifiable by the circumstances, and the circumstances were such as to justify a person in claiming for a total loss. The constructive total loss, in other words, must exist before either the sale or notice of abandonment; the circumstances must be such as to justify it. I think we must take it the ship was in such a condition, that the assured was entitled to abandon, and to claim for a total loss, but for a constructive total loss only; the questions then are, first, whether the assured was excused from giving notice of abandonment, and, if not, whether he gave any notice of abandonment; and secondly, if he did give notice of abandonment, whether he gave it within the legal time, because if he gave the notice, yet if he did not give it within the legal time, he cannot recover for a total loss.

"It was argued before us that this was an actual total loss. I do not stop to enter into that; it is clear the ship was not an actual total loss; but I think we are bound to take it that she was a constructive total loss. She was in imminent danger of becoming a total loss to the owner. She may become a total loss to her owner either by perishing, although she has not yet perished, or she may become a total loss by reason of the cost of repairs being greater than the value of the ship when repaired; in either case she becomes a total loss to her owner. I think we must take it that the circumstances were such that the owner had a right to consider that in all probability the cost of repairing that ship would be greater than her value when repaired, and that she would become a total loss. Therefore he was justified in assuming there was imminent danger of her becoming a total loss, and he would, according to the rule I have enunciated, the moment he received information which would lead any reasonable man to come to that conclusion, be bound to give notice of abandonment unless he was excused. . . .

"On the 7th February those owners at Singapore received certain information as to the condition of the ship, and they did not, in fact, receive any material additional information after that time, and upon that very information which they received they did eventually act, in resolving to abandon the ship and in giving notice of abandonment, if any notice was given. It is clear that, unless they were otherwise excused, on the 7th February they had [such] information with regard to this ship as showed that she was in imminent danger of becoming a total loss, and that at that time they were bound to act upon it, and to make up their minds whether they would abandon or not, and if they made up their minds to abandon, to give notice of abandonment. That being the state of things on the 7th February the ship was not sold. Therefore the case is not within the rule in *Rankin v. Potter*. They did not receive notice of such damage as made it imminent that the ship might become a total loss and at the same time notice that the ship was sold, but they received the information of the damage that had happened to the ship before they received information that the ship was sold. But it is said that at that time the ship was in such a condition that,

before any answer to a notice of abandonment could be received from the underwriter, a reasonable man might have sold her. I do not enter into that consideration, because that is not the rule by which the case is governed. It was said that the assured ought to have sent forward the information by telegraph. If the telegraph was in use, and known by the majority of persons in business to be in use, between Singapore and Europe, it is clear the information ought to have been telegraphed to the underwriter in London, but if that was not so, then it would be justifiable to send the information by letter. . . . It would appear that the owners had notice of the imminent danger of the ship on the 7th February, and the case is not brought within *Rankin v. Potter*; therefore the owners ought to have given notice of abandonment immediately after the 7th February. They ought to have sent forward that notice unless circumstances prevented them. When I say that they were bound to send notice immediately to the underwriters, it must be subject to this, that if there was no post for a fortnight, 'immediately' then is extended into a fortnight; but they would have no right to let a post pass, neither would they have any right to do what they did, which was not to send notice to the underwriters, not to send notice to an agent to inform the underwriters, not to send instructions to anybody to abandon the ship, but to send forward a mere report stating the circumstances about the ship to their co-owner at Zürich, not to tell him to abandon, but leaving it to him to consider whether he would abandon or not. The owners at Singapore might have intended to act in perfect good faith to the underwriters, but they made this mistake: instead of sending to the underwriters, or to the agent of the underwriters, notice of their intention to abandon, they did neither [the] one nor the other, but they only sent forward a communication to their co-owner, in order that he should determine whether he would abandon or not. They failed to send notice of abandonment, and the question does not arise what time notice of abandonment was given. But it was assumed by Lord Coleridge C.J., and therefore we must take it either that on the 11th March the underwriters received the notice, or that it was on the 11th March the assured resolved to send and did send the notice; but even if the underwriters received it on the 11th March there is the fatal gap between the time when the owners at Singapore received that information, and the time when the owner at Zürich made up his mind to act upon it. It was the owners at Singapore who ought to have acted, and they ought either on the 7th or by the next post or the next telegraph, to have sent forward notice to the underwriters, or, at all events, instructions to some agent of theirs to give notice to the underwriters, because the only mode of abandonment in cases of marine insurance, is to give notice of abandonment, and the assured is bound to give notice. It is the notice which is the symbol of the abandonment. That notice must be given in a particular time. In this case it is obvious it was not. Therefore, although it must be assumed there were circumstances which entitled the assured to treat the loss as a total loss, and although it must be taken that at some time or other he did give notice of abandonment, yet, in my opinion, the evidence is beyond dispute that he did not give notice of abandonment at the proper time and the giving notice in proper time, unless some excuse exists, is a condition precedent. No such excuse existed in this case. Therefore Lord Coleridge was right in saying that the plaintiff could not recover. The judgment

of the Common Pleas Division, with great deference, was wrong. The Court carried the words of Lord Blackburn in the opinion which he gave in *Rankin v. Potter* too far. They carried them further than the decision required, and I cannot help thinking they carried them further than Lord Blackburn intended them to be carried. This appeal must therefore be allowed."

Cotton and Thesiger L.JJ. delivered judgments to the same effect.

KIDSTON *v.* EMPIRE MARINE INSURANCE COMPANY (1867)
COURT OF COMMON PLEAS, vol. ii. page 357, EXCHEQUER CHAMBER.

Freight—Forwarding expenses—Sue and labour clause.

The plaintiffs effected an insurance with the defendants on the chartered freight of a ship (*Sebastopol*) for a voyage from C to E. The policy contained the usual suing and labouring clause, and a warranty against particular average. During the voyage the ship was so much damaged in a storm that it put into R, where it became a total wreck. The goods were landed and forwarded in another ship (*Caprice*) to their destination, at an expense less than the chartered freight, and on their arrival the chartered freight was paid. In an action to recover from the underwriters a proportionate part of the expense incurred in forwarding the goods by the second ship:

Held, that there would have been a total loss of the freight at R if the goods had not been forwarded, and that the plaintiffs were entitled to recover the sum claimed under the suing and labouring clause of the policy.

At the trial, evidence was given that expenses incurred in preserving the subject-matter of insurance were not "particular average" but "particular charges," as those terms were understood in the business of marine insurance:

Held, that this evidence was admissible to show the mode in which such expenses were treated by mercantile men; but that the usage proved by it was in affirmation of the common law, and did not control or vary the language of the policy.

Appeal from the decision of the Court of Common Pleas discharging a rule to enter a verdict for the defendants or a non-suit.

The judgment of the Court (Kelly C.B., Channell B., Mellor J., Piggott B., and Lush J.) was delivered by KELLY C.B. at page 363 (after stating the facts):

"Under these circumstances the plaintiffs brought this action, with a count claiming for a total loss of freight, and another count for £1145 : 3 : 6 under the suing and labouring clause, for the charges and expenses of conveying the cargo from Rio to this country. It was contended for the plaintiffs that when the ship had become a wreck, and the cargo had been landed at Rio, when no freight could be claimed by the law of England *pro rata itineris*, that a total loss of freight had been incurred; and that inasmuch as the proportion of the homeward freight by the *Caprice* being a charge incurred in preserving the subject-matter of the insurance, and so relieving the defendants, the underwriters, from their liability as for a total loss of freight, it was a charge within the suing and labouring clause, which the plaintiffs were entitled to recover. On the other hand, it was insisted for the defendants that, inasmuch as the plaintiffs were able to forward the goods to England by another vessel, at an

amount of freight substantially less than the entire freight as valued under the policy, a partial loss only, and not a total loss of freight had been incurred, which the warranty against particular average precluded the plaintiffs from recovering. It was argued that the master was bound, under the circumstances that had occurred, to forward the goods to England ; that his ability to do so, and so to earn the whole of the freight, subject to a deduction of the cost of the conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the particular average clause. We are of opinion, however, that upon the ship *Sebastopol* becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight *pro rata itineris* could be claimed, a total loss of freight had arisen, and that the expenses incurred in forwarding the goods to England by another ship were charges within the suing and labouring clause incurred for the benefit of the underwriters, to protect them against a claim for total loss of freight to which they would have been liable but for the incurring of these charges, and that consequently the amount is recoverable under that clause in the policy.

" The question raised by the defendants, whether the owner was bound under these circumstances to forward the goods to England, is attended with some difficulty and uncertainty. It has been considered and in effect decided in America. (The judgment then referred to *Parsons on Maritime Law*, vol. ii. page 385, and some dicta of Kent C.J. in a case reported 9 Johnson 17, respecting American law on the subject, and continued at page 365) : But it is unnecessary to decide this point, for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port, he is at all events at liberty to do so, and thus to earn his entire freight ; and we think that under a policy like this, he is entitled to claim the cost which he so incurs under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby preserved the subject-matter of insurance from total loss to which it would otherwise have been liable upon the policy. It would seem then that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound policy. For if the master knows, where the ship has been lost and the cargo may be sent forward to its destined port, that his owner will be indemnified in respect of the cost which he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo ; whereas if the cost of the conveyance of the goods for the rest of the voyage is to fall on his owner without recourse to the underwriters, he will be exposed to the temptation of evading the performance of what may at least be termed a moral duty, and may leave the cargo to its fate in the foreign port in which it may have been unshipped.

" We are of opinion, therefore, whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, that upon the facts of this case there was a total loss of the freight when the ship had become a wreck and the goods had been landed at Rio ; and that the cost incurred by the master in shipping the goods by the *Caprice* and causing them to be conveyed to this country, is a charge within the express terms of the suing and labouring clause, and that the

amount or the due proportion of it, is recoverable under the clause against the underwriters."

(The judgment then referred to the cases of *Great Indian Peninsular Railway Co. v. Saunders* and *Booth v. Gair*, being cases of insurance on goods and not on freight, and noted that Mr. Justice Blackburn forbore to intimate any opinion upon the point; referred also to the American case of *Jordan v. Warren Insurance Co.* as having no application, and continued at p. 367):

"It only remains to observe upon the evidence given in this case that expenses incurred in preserving the subject-matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to show the mode in which expenses of this nature are treated by mercantile men. But this evidence or the usage that it proves, is in affirmation of the law of England, which of itself defines the nature and character of these charges, and if rejected and struck out of the case would leave the question in the cause as it was before.

"We think, therefore, on the whole, and upon the true construction of the policy, that on the destruction of the ship and the landing of the cargo at Rio, there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by another ship to Great Britain; that the forwarding the cargo by the *Caprice* was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of total loss into a partial loss, which brought the case within the warranty against particular average; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject of the insurance, and to prevent a total loss, is recoverable under the policy in this action.

"The judgment of the Common Pleas must therefore be affirmed."

THE "LEITRIM" (s.) (1902)

HUDSON *v.* THE BRITISH AND FOREIGN MARINE
INSURANCE COMPANY

PROBATE DIVISION, page 256.

Loss of hire, resulting from repairs, not allowed in General Average.

By the practice of average adjusters, loss of time freight—resulting from detention under repair of general average damage—is not allowed in general average:

Held, by Gorell Barnes J., that the practice is right, being in accordance with legal principles, for the loss of freight under a time charter caused by the delay is the result of an accidental circumstance peculiar to the shipowner and time charterer, and arising out of the contract between them, with which the cargo-owner is not concerned, and where loss of time is common to all the parties interested, and all suffer damage by the delay, the damage by loss of time may be considered proportionate to the interests, and, therefore, left out of consideration.

The words "all loss" in the definition of a general average sacrifice in *Birkley v. Presgrave* (1801), 1 East 220 at p. 228; 16 R.R. at p. 263, explained:

The *Leitrim* is a steel screw steamship of Sunderland . . . and . . . she is fitted with refrigerating machinery and insulated space. . . .

By a charter-party dated 2nd February 1900, the *Leitrim* was chartered by the plaintiff to William Milburn & Co. for five calendar months from the date of her delivery to the charterers in London.

By clause 3 the owners were to provide and pay for all the provisions, wages . . . and pay for the insurance of the vessel; also for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery both for propelling and refrigerating purposes for and during the service.

By clause 6 the charterers were to pay for the use and hire of the vessel at the rate of £1680 per calendar month. . . .

By clause 16 the charterers were to have the option of continuing the charter for a further period of five months. (This option was exercised and the time of the employment of the vessel would expire on 20th January 1901.)

By clause 17, in the event of loss of time from deficiency of men or stores, . . . or damage preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she is again in an efficient state to resume her service; and should she in consequence put into any other port than that to which she is bound, the port charges and pilotage at such port to be borne by the steamer's owners. . . .

By clause 28 the charterers were to have the liberty of subletting the steamer for Admiralty transport or other service. . . .

By a policy dated 18th June 1900, and issued by the defendant Company, the *Leitrim* was insured by her owners for £4000.

By a charter-party dated 5th September 1900, the charterers, W. Milburn & Co., sublet the *Leitrim* to Houlder Bros. & Co. for a voyage from Barry to Cape Town with a cargo of coals at a rate of freight of 35s. per ton delivered. By clause 11 "in case of average, the same to be settled according to York-Antwerp Rules, 1890."

The vessel after bunkering at Liverpool proceeded to Barry, and on 12th September began loading the coals in No. 2 hold, the loading in that hold being completed the next day. On 15th September, whilst the loading was proceeding in the other holds, fire broke out in No. 2 hold, and spread to the bunker coals stowed in the cross bunker abaft that hold. . . . After the fire was extinguished the coals from No. 2 hold and the cross bunker were landed and sold. In addition to fire damage to the insulation, the employment of water to extinguish the fire so damaged the charcoal and paper of the insulation as to necessitate the renewal of nearly all of it, and in order to replace and repair it, all the brine pipes in this hold and in the cross bunker were necessarily removed. . . .

The time necessary for the repair of the insulation damaged by water, together with the incidental removal and reinstatement of the brine pipes would by itself have been thirty-one days.

After the repairs to the ship were completed, fresh coals were shipped to replace those discharged, and the voyage to the Cape was duly prosecuted. . . .

A statement of General and Particular Average was prepared, dated 11th February 1901, to which the plaintiff objected on the ground that it did not allow the loss of hire, which he contended should be made good in General Average as a voluntary sacrifice.

A supplementary statement was then prepared, dated 14th

January 1902, allowing in General Average the sum of £1340 : 2 : 11 as "net loss of time resulting from detention under repair of General Average damage exclusively after crediting wages and provisions of crew already allowed in General Average," and the question for the opinion of the Court was :

Whether this sum of £1340 : 2 : 11 was rightly included in General Average. If so, the plaintiff was to be taken to be entitled to recover £66 : 18 : 6. If not, judgment was to be entered for the defendants.

Average adjusters were called by the defendant Company, and gave evidence that it was not the practice in average adjustment to include loss of time freight.

GORELL BARNES J. (at page 265): "The question raised by these facts is novel and difficult, and so far as I am aware it has not been considered by the courts. It was, however, well argued before me by counsel on both sides and evidence was given by experienced average adjusters to the effect that, according to the practice of average adjusters, a loss of time charter freight in such cases is never included in general average. No evidence to the contrary was given, and I think, therefore, it may be taken that the practice of average adjusters is uniform in this matter.

"The question, therefore, comes to be whether this practice is right, because, although it was suggested by counsel for the defendant Company that, as the sub-charter provided that in case of average the same was to be settled according to York-Antwerp Rules, 1890, and that under rule 18 of those rules 'Adjustment, except as provided in the foregoing rules (which do not apply to the present case), the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules'—the adjustment should be in accordance with the practice, yet that rule does not, in my opinion, mean that the adjustment is to be in accordance with practice, if the practice conflicts with the laws. I have therefore to determine what is the law applicable to this case.

"The real question appears to me to be whether the shipowner is entitled to some compensation in general average for the delay caused by the sacrifice. I do not think that the question is whether he is entitled to be compensated in general average for the particular consequences of the delay in this case, because that would be to make the rights and liabilities of the cargo-owner depend entirely on the contract of time charter, to which they are in no way parties. The shipowner's loss of freight is caused by the operation of the cesser clause No. 17 in the original time charter. If that clause had not been inserted, the time charterers would have remained liable to pay the freight in accordance with the principle upon which the old case of *Ripley v. Scaife* was decided, and, in my opinion, the cargo-owners ought not to be affected by the question whether the loss of time falls, by the contract between the shipowners and the time charterers, to be borne by the one or the other. . . .

"Counsel for the plaintiff relied upon the well-known passage in Laurence J.'s judgment in *Birkley v. Presgrave*, which is 'All loss which arises in consequence of extraordinary sacrifices made or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested.' They argued that the hire for thirty-one days was lost by the sacrifice, and that therefore it ought to be borne

proportionably by all who are interested. But in my opinion, the words 'all loss' in this and other statements of the principle of general average have not the width of meaning attributed to them by the plaintiff's counsel. They ought not, I think, to be held to include losses which . . . are the result of 'accidental circumstances' affecting the loser, and are not losses which the other persons interested ought in ordinary course to be treated as concerned with. This term is to be found in the judgment of Lord Esher in *Rodocanachi v. Milburn*. That was an action by charterers against shipowners for non-delivery of cargo, and the plaintiff had sold the cargo to arrive. It was held that in estimating the damages the market value at the time when the cargo should have arrived must be looked at, and not the price at which the plaintiffs had sold the cargo. Lord Esher said, 'But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is settled that in an action for non-delivery, or non-acceptance of goods under a contract of sale, the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern, but the contract price. I think that if the law were so it would be very unjust. I adopt the rule laid down in *Mayne on Damages*, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods. That rule gives the mode of estimating the value which is to be taken for the purpose of arriving at the damages.'

"It is for similar reasons that although where goods have been sold to arrive, and have been jettisoned in circumstances giving rise to a general average loss, the actual loss to the merchant is the price at which the goods were sold, yet the market value of the goods at the time of the ship's discharge is the basis of compensation. So, also, in my opinion, the reason why . . . the chartered freight is left out of consideration in assessing the compensation for freight lost by jettison of goods, is that the chartered freight is a matter with which the owners of cargo are not concerned, and its loss may be termed an 'accidental circumstance' peculiar to the ship-owner.

"These considerations lead me to the conclusion that the cargo-owners have no concern with the contract between the shipowners and the charterers, that the loss of freight under it caused by the delay is the result of an accidental circumstance peculiar to the shipowners and time charterers, and that the question is whether the shipowner is entitled to be compensated in general average on the basis of the ordinary consequences of the delay, as if the ship were carrying the goods simply under the contract under which they were shipped. This is a different question from that which has been discussed in text-books as to the allowance in general average, to the owners, of the expenses of maintaining and paying

the crew during the delay caused by the execution of repairs rendered necessary by a general average sacrifice. . . . (After referring to the allowance for wages and maintenance of crews, the judgment proceeds :)

"But it does not at all follow that the mere loss of the profitable employment of the vessel as distinguished from actual expenses should in such a case be allowed. In the first place, so far as I can ascertain, a loss of this character has never been claimed in general average. It is not introduced in the York-Antwerp Rules, nor can I find any trace of it being allowed by the laws of any foreign country, though many of them contain provisions as to the allowance in general average of the wages and maintenance of the crews.

"It may be said, why on principle should not the loss of time be compensated for where that loss is due to the necessity for repairing damage, itself the subject of general average ? I think the answer is that though possibly there may be cases in which the loss of time is not common to all concerned, at any rate in cases like the present the loss of time is common to all the parties interested, and all suffer damage by the delay, so that the damages by loss of time may be considered proportionate to the interests and may be left out of consideration. . . . Counsel for the plaintiff felt the difficulty there is in allowing claims for delay of a general character to be introduced into a statement of general average, and they endeavoured to distinguish between such claims and that in the present case, the former, as they said, being speculative and the latter definitely ascertainable. But as I have already noticed, this definite loss is due to arrangements between the actual owner and the owners *pro hac vice* of the vessel which ought not to affect cargo-owners who have no cognizance of such arrangements, and are not parties thereto, and place their goods on board the vessel on the terms that they shall be subjected to the ordinary incidents involved in so doing.

"In my opinion, therefore, the practice affecting this matter, proved by the average adjusters who have been called, is in accordance with legal principles, and is right, and I answer the question submitted to me in the negative. The consequence is that judgment will be entered for the defendants with costs."

LETCHFORD *v.* OLDHAM (1880)

QUEEN'S BENCH DIVISION, vol. v. page 538, COURT OF APPEAL.

Grounding in tidal harbour—In what cases becoming Stranding.

A policy of marine insurance on cargo contained the usual warranty against average unless the ship were stranded. The place of discharge was in a tidal harbour, where vessels of the size of the ship in question can only get to the quay to unload during high spring-tides. A ship arriving in the port is brought towards the quay as soon as in the pilot's judgment there will be water enough to float her there, and, if in the course of getting her to the quay the depth of water proves insufficient, she takes the ground to wait until the next tide admits of her being floated further. The ship in question was in the course of being brought to the quay, but it was found that she could not get within twenty feet of it, and consequently she was left where she was to await a higher tide. As the tide receded and she settled down, instead of resting on an even

keel she pitched by the head into a hole, and remained in such a position as to cause her timbers to be strained, by reason whereof she made water and damage to the cargo resulted. It afterwards appeared that there was an elevation in the bottom of the harbour, a small bank having been formed parallel with the quay, and a hole beside it into which the vessel had pitched. This state of things had been caused by the paddles of the steamers leaving the harbour at low tide, and its existence had not been found out previously to the accident:

Held, that the taking of the ground by the vessel was under circumstances of such an accidental and unforeseen character as not to be in the ordinary course of navigation and to amount to a stranding.

The trial took place before Field J. without a jury, who gave judgment for the plaintiff on the ground that such taking of the ground was not in the ordinary course of navigation and management so as to have been in the contemplation of the parties as likely to happen, but was due to the unforeseen accidental circumstance of the casual formation of the bank and hole which forced the vessel into an unusual and damaging position, resulting in the injury before mentioned.

The defendant appealed.

BRETT L. J. (at page 545): "I think that the judgment of Field J. was right, and ought to be affirmed. I will not try to give an accurate or exhaustive definition of 'stranding.' I accept as correct the definitions given by Lord Tenterden C. J. in *Wells v. Hopwood* [1832] and by Tindal C. J. in *Kingsford v. Marshall* [1832]. In some cases I think it unnecessary to use the exact words which Tindal C. J. employed. He used the following language: 'Now it is perfectly clear and has been settled by various decided cases, that by the term "stranding" neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say that when a vessel in the course of a voyage insured, is sailing in a tide river or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. . . . We think a stranding cannot be better defined than it has often been in several decided cases, namely, where the taking of the ground does not happen solely from those natural causes, which are necessarily incident to the ordinary course of the navigation in which the ship is engaged either wholly or in part, but from some accidental or extraneous cause.' In applying this doctrine to the facts before us, we may paraphrase it by saying that a vessel is stranded where the taking of the ground does not happen from usual causes ordinarily incident but from unusual causes. It has been argued that there cannot be a stranding while the vessel is in the ordinary course of navigation, and the counsel for the defendant in effect contended there can be no stranding whilst the vessel is in the ordinary track: I cannot assent to that, for it would follow that whilst she was in the ordinary track for the voyage, no taking the ground could be deemed a stranding, although it might happen from causes of a most unusual kind. It is sufficient to say that where by temporary circumstances the bottom of the harbour is in a different condition from its ordinary state, and a vessel takes the ground in a different manner from that which was intended she may be said to be stranded.

If this be true, the only question is whether the bottom of the harbour was in a different condition from its usual state. If it were true that steamers had habitually altered the ground by using their paddles, the shifting condition of the harbour would have been its ordinary condition ; similarly if the harbour had been altered by the tide or by a running stream which occasionally brought down much water the changeable condition would be the ordinary condition ; but upon the facts of the present case the judge was justified in finding that some steamers using the harbour had taken the unusual course of forcing their way out of the harbour, and had thus temporarily altered the bottom. Certainly the vessel took the ground in a different way from what was anticipated, and the accident was caused by a temporary alteration of the harbour. It was an unusual event, and I think that the vessel was stranded within the meaning of the policy."

Cotton and Thesiger L.J.J. were of the same opinion.

LEWIS *v.* RUCKER (1761)

BURROWS, vol. ii. page 1167.

Particular average on goods—Mode of adjustment.

A rule having been obtained by the plaintiffs (the assured) for the defendant (the insurer) to show cause why a verdict given for the defendant should not be set aside and a new trial had.

This was an action on a policy on sugar, coffee, and indigo ; sugar warranted free from average under 5 per cent and all other goods under 3 per cent unless general or the ship be stranded.

In the course of the voyage sea-water got in, and the whole of the sugar was damaged, necessitating its immediate sale on arrival, and it was accordingly sold ; the sound value on date of sale being £23 : 7 : 8 per hogshead ; damaged value £20 : 0 : 8 per hogshead.

The defendant paid money into court, by the following rule of estimating the damage : he paid the like proportion of the sum at which the sugars were valued in the policy as the price of the damaged sugars bore to sound sugars at the port of delivery. . . . It was admitted that the money paid in was sufficient if the rule by which the defendant estimated the loss was right, and the only question at the trial was by what measure or rule the damage (upon all the circumstances of the case) ought to be estimated.

LORD MANSFIELD (at page 1170) : "The defendant takes the proportion of the difference between sound and damaged at the port of delivery and pays that proportion upon the value of the goods specified in the policy ; and has no regard to the price in money which either the sound or damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule whether the goods come to a rising or a falling market. For instance, suppose the value in the policy £30. They are damaged, but sell for £40 ; if they had been sound they would have sold for £50 ; the difference is $\frac{1}{5}$ th, the insurer then must pay a fifth of the prime cost or value in the policy (that is £6), and conversely : If they come to a losing market and sell for £10 being damaged but would have sold for £30 [say £20] if sound the difference is $\frac{1}{2}$, the insurer must pay half the prime cost or value in the policy (that is £15).

"To this rule two objections have been made :

"First objection. That it is going by a different measure in the case of a partial from that which governs in the case of a total loss, for upon a total loss the prime cost or value in the policy must be paid.

"Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage : the insurer engages, so far as the amount of the prime cost, or value in the policy, 'that the thing shall come safe' ; he has nothing to do with the market ; he has no concern in any profit or loss which may arise to the merchant from the goods ; if they be totally lost he must pay the prime cost, that is, the value of the thing he insured, at the outset ; he has no concern in any subsequent value.

"So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost, as if there be 100 hogsheads of sugar and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other 90 may be sold.

"But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage, but if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. How is this to be found out ? Not by any price at the outset port, but it must be at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound ; consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing ; and as the insurer pays the whole prime cost if the thing be wholly lost, so if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged.

"Second objection. The next objection with which this case has been much entangled is taken from this being a valued policy.

"I am a little at a loss to apply the arguments drawn from thence. It is said 'that a valued is a wager policy (like interest or no interest), if so there can be no average loss ; and the assured can only recover as for a total, abandoning what is saved, because the value specified is fictitious.

"Answer. A valued policy is not to be considered as a wager policy, or like 'interest or no interest' ; if it was, it would be void by the Act of 19 Geo. II. c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial ; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the assured meant only to have an indemnity.

"If it be undervalued, the merchant himself stands insurer of the surplus. If it be much overvalued it must be done with a bad view ; either to gain contrary to the 19th of the late King, or with some view to a fraudulent loss ; therefore the assured never can be allowed in a court of justice to plead that he has greatly overvalued or that his interest was a trifle only.

"It is settled 'that upon valued policies, the merchant need only prove some interest, to take it out of 19 Geo. II. Because the adverse party has admitted the value ; and if more was required the agreed valuation would signify nothing.' But if it should come out

in proof that a man had insured £2000 and had interest on board to the value of a cable only, there never has been, and I believe there never will be a determination that by such an evasion the Act of Parliament may be defeated.

" There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion.

" The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved, in a valued policy it is agreed.

" To argue that there can be no adjustment of an average loss upon a valued policy is directly contrary to the very terms of the policy itself. It is expressly subject to average if the loss upon sugars exceed £5 per cent; if it was not, the consequence would not be that every partial loss must thereby become total, but the event to entitle the assured to recover would not happen, unless there was a total loss. Consequently the plaintiffs in this case would not be entitled to recover at all, for there is no colour to say this was a total loss. Besides the plaintiffs have taken the goods and sold them.

" In opposition to the measure the jury have gone by, the plaintiffs contend that they ought to be paid the whole value in the policy upon one of two grounds.

" First, because the general rule in estimating should be the difference between the price the damaged sugars sell for and the prime cost (or value in the policy). Here the damaged sold for £20:0:8 per hogshead; and the underwriter should make it up to £30.

" Answer. It is impossible this should be the rule. It would involve the underwriter in the rise and fall of the market; it would subject him in some cases to pay vastly more than the loss, in others it would deprive the assured of any satisfaction though there was a loss.

" For instance, suppose the prime cost or value in the policy £30 per hogshead; the sugars are injured; the price of the best is £20 per hogshead; the price of the damaged is £19:10s. The loss is about a fortieth and the insurer would be to pay above a third.

" Suppose they come to a rising market and the sound sugars sell for £40 a hogshead, and the damaged for £35, the loss is an eighth; yet the insurer would be to pay nothing.

" The second ground upon which the plaintiff contends that the £30 should be made up is, that it appears the sugars would have sold for that price if the damage from the sea-water had not made an immediate sale necessary. . . . The nature of the contract is 'that if the goods shall come safe to the port of delivery; or if they do not, to indemnify the plaintiff to the amount of the prime cost or value in the policy. If they arrive, but lessened in value through damage received at sea, the nature of the indemnity speaks demonstrably that it must be by putting the merchant in the same position (relation being had to the prime cost or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion or aliquot part of the prime cost or value in the policy as corresponds with the proportion or aliquot part of the diminution in value occasioned by the damage.'

" The duty accrues upon the ship's arrival and landing her cargo at the port of delivery, the assured has then a right to demand satisfaction. The adjustment never can depend upon future events

or speculations. How long are they to wait? a week, a month, or a year? . . . But the decisive answer is, that the underwriter has nothing to do with the price; and that the right of the assured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

"We are of opinion that the plaintiffs are not entitled to have the price for which the damaged sugars were sold made up to £30 per hogshead; and it seems to us as plain as any proposition in Euclid, that the rule by which the jury have gone is the right measure.

"The rule must be discharged."

LIDGETT v. SECRETAN (1871)

L.R., C.P. vol. vi. page 616.

Marine Insurance—Average loss—Expense of repairs not actually done when a subsequent total loss occurred—Merger—Valued policy.

The plaintiffs insured their iron ship "C," valued at £20,000, in a policy for £18,000, "at and from London to Calcutta and for thirty days after arrival," and in another policy for £10,000 "at and from Calcutta to London." The defendant underwrote the first policy for £150 and the second for £100.

On her outward voyage the "C" struck upon a reef or bank and sustained damage, and in order to get her off part of her cargo was jettisoned. She reached Calcutta on the 28th October, and the unloading of her outward cargo was completed by the 8th of November. She was then dry docked for survey and repair. Whilst the repairs were in progress, the outward policy expired, and on the 5th December the ship was totally destroyed by fire.

Held, that under the first policy the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that under the second policy they were entitled to recover as for a total loss without reference to their claim under the first policy.

Quaere, whether, in estimating the petition under the first policy, the customary deduction of "one-third new for old" is applicable to iron vessels?

Judgment had already been given (L.R. 5 C.P. 190) that the outward policies had expired at the time the vessel was destroyed by fire, and were therefore not liable for a total loss, subject to the opinion of the court upon a special case, and also as to the principle upon which the partial loss under the outward policy was to be calculated, in the event of the plaintiff's being held by the court not to be entitled to recover a total loss under the outward policy.

WILLES J. (at page 626): "The period at which the liability of the underwriter on the first policy is to be determined is, at the expiration of the first risk. Therefore it is right that he should be held liable for the sum which he ought to have paid at that time, which would be the diminution in value of the vessel by reason of the damage which she had sustained.

"I do not think we are called upon to go into details. The only question we are asked to decide is, what are the true principles upon which the loss is to be assessed? The true principle I apprehend

to be this : The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk—the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair, but he must do this only for the purpose of arriving at the diminution of value at the expiration of risk. That, of course, must be subject to all proper allowances. . . .

"The second point arises upon the second policy, and is one of great importance, and one which has been subject of much discussion and criticism both by lawyers and legislators ; and yet nobody has been able to improve upon the practice as to valued policies which has been recognised and adopted by shipowners and underwriters, and has, at least amongst honest men, the advantage of giving the assured the full value of the thing insured, and of enabling the underwriter to obtain a larger amount of profit. . . ."

His Lordship referred to the case of *Barker v. Janson*, L.R. 3 C.P. 303, 1868, and considered that though that case was one arising on a time policy, the same principles respecting the valuation applied to a voyage policy and proceeded :

(At page 629) "In the absence of fraud or wagering it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time. . . . The result is that, in my opinion, we ought at once to give judgment for the plaintiffs."

Montagu Smith J. delivered judgment to the same effect.

LYSAGHT *v.* COLEMAN (1895)

Q.B.D. vol. i., page 49, COURT OF APPEAL.

Part cargo damaged—Expense of examining undamaged part—Liability.

A cargo of galvanized iron, consisting of a number of cases each containing several sheets of iron, was insured by a policy that warranted the subject-matter of insurance free from average under 3 per cent, and declared average to be recoverable on each package separately or on the whole. The insurance was from Bristol to London until safely delivered on board export vessels if so forwarded. Some of the iron was damaged during the voyage to London by perils insured against, and the whole was, on arrival in London, landed, unpacked and examined. The examination showed that the iron in a number of cases had been damaged to a considerable extent, but that the iron in the other cases was undamaged. The contents of cases in which any iron had been damaged were sold, and the rest of the iron was repacked and forwarded to its destination by the shippers, who claimed from the underwriters the whole expense arising from the unloading of the cargo for examination.

Held (affirming the judgment of Willes J.), that the underwriters were not liable to indemnify the assured in respect of the expenses incurred by them in relation to any part of the cargo other than those cases which contained iron that had been damaged by the perils insured against.

LORD ESHER M.R. (at page 51) : " In this case the plaintiffs shipped at Bristol a cargo of galvanized iron, to be carried to the Thames, and there to be delivered to the plaintiffs into barges to be supplied by them, and when this was done the plaintiffs were to take the iron to another ship to be carried to Australia. . . .

" The ship arrived in the Thames, but during the voyage she met with heavy weather, and that was a peril of the sea which did damage to part of the goods on board. That gave the assured a right against the underwriters. They had insured all the galvanized iron, but the policy contained a paragraph stating that average was recoverable on each package separate or on the whole. . . . When the goods arrived the assured, having taken them into their own control, noticed the damage to some of the packages, and considered that it would not be for their interest to send on the goods without examining them. They therefore directed the barges to go to the West India Docks, and then by their order the goods were landed for the purpose of ascertaining what packages contained iron that was damaged and to what extent. They gave notice to the underwriters, who declined any responsibility for undamaged goods, and left the assured to do their best, which indeed was what they were bound to do ; but the underwriters appointed a surveyor to attend the examination on their behalf. The assured examined the packages, and found that 106 of them contained damaged iron, and they separated the whole into two lots, putting all the packages in which some of the iron was damaged on one side, and the remainder on the other side. The former were sold and the remainder were treated as undamaged goods, and repacked and sent forward to Australia. The assured thus elected to treat the insurance as being on each package, and in respect of those that contained damaged iron they claimed the difference between the invoice price and the net sum that resulted from the sale. This claim the underwriters allowed and have paid. The assured were also allowed the cost incurred in respect of those packages, so that in regard to them they have been fully paid. They claim, however, more than this, for they claim the costs incurred by them in respect of the other packages. They must put their claim in one of two ways. One way is to say that the undamaged goods were made of less value because of the damage to the other packages, because thereby they had lost their character and would not sell for so much in the market. If they put their claim in this way, the answer is that it is contrary to the rules of insurance. The only other way to support the claim is to treat it as part of the damage to the damaged portion of the goods. As to this, it is enough to say that it is impossible to make out how the damage to one part of the goods can be affected by the examination of the other part. What the assured did was no doubt a reasonable thing to do in their own interest, but they cannot throw the cost of doing it on the underwriters. The authorities are against the plaintiff's contention. In *Stevens on Average*, in Part I. s. 3, art. 10, it is pointed out that the underwriter engages to guarantee the assured against the direct operation of sea damage and not against the consequential results ; and the highest that could be said of the claim in this case is that it was in respect of damage which was a consequential result of the sea peril, and it is very doubtful whether that could be justly said. . . . As to other arguments in support of the plaintiff's case it is quite impossible to say that what was done here was to save loss to the underwriters, and I think I ought to say

also that it is clear that the insurance was on the iron, so that no claim could arise in respect of damaged packing cases. The decision of the learned judge must, therefore, be supported and the appeal dismissed."

Lopes and Rigby L.J.J. delivered judgments to the same effect.

THE "MAIN" (s.) (1894)

(ANGLO-AMERICAN S.S. CO. v. NATIONAL MARINE
INSURANCE ASSOCIATION)

PROBATE DIVISION, page 320.

Loss of freight.

The plaintiffs, whilst their vessel was on her way to New Orleans, and in anticipation of a full homeward cargo, effected a policy of insurance with the defendants for £1500 upon "freight valued at £5500," "at and from New Orleans to Liverpool," the insurance to commence from the loading of the cargo.

At the date of the policy this valuation was reasonable and proper upon a full cargo, having regard to the rates of freight then current at New Orleans, and to the engagements of cargo for the vessel; but on her way out she met with an accident, and during the time occupied in repairs the rates of freight at New Orleans declined considerably, and the greater part of the engagements of cargo had to be cancelled. After some months' delay, the vessel sailed for Liverpool with a full cargo, the total freight on which amounted to £3250, of which £952 was paid in advance. In the course of the voyage the vessel was lost by a peril insured against, and the total freight at risk £2298 also lost. The plaintiffs collected under other policies the sum of £3250, and in an action against the defendants claimed £1500 from them.

The defendants contended that the valuation must be opened, and that, on the actual amount of freight at risk, the plaintiffs had been fully indemnified under other policies.

Held, by Gorell Barnes J. that the valuation was binding; but as freight to the amount of £952 had been paid in advance, and was therefore not at risk, the valuation of £5500 must be reduced by £1611, being the proportion of the prepaid freight to the gross freight, leaving £3889 as the value at risk, and as, of this sum, the plaintiffs had received £3250, the amount recoverable from the defendants was £639, with a small proportionate return of premium.

Forbes v. Aspinall, 1811, distinguished.

GORELL BARNES J. (at page 322): "The substantial point raised before me, apart from a subsidiary point as to amount, involves chiefly this question, whether the plaintiffs can recover on the footing of the valuation in the policy effected by them with the defendants, or whether that valuation can be opened so as to entitle the plaintiffs only to recover on the footing of what was actually at risk, with the result that in consequence of the payments already made to the plaintiffs they will have been fully indemnified for what was at risk, and therefore recover nothing on the policy.

"In order to arrive at a solution of that question, I have to consider, first, whether the policy attached to and covered the freight on this voyage. The plaintiffs say it did, and that that being so, the valua-

tion applied to what was at risk on that voyage, and is binding on the parties. And . . . I do not think it was really disputed that the policy in fact attached upon this voyage to the freight which was at risk. The real contention raised by the defendants is that this valuation must be opened. Now what was it that was valued in the policy. By the agreement of the parties it is freight valued at £5500 in the *Main* on a voyage from New Orleans to Liverpool. I think the freight so valued meant the gross freight of the ship. I do not think, looking at the facts, that they intended when they took the policy out, or that the underwriters assented to or agreed, that what was valued was other than the gross freight of the voyage.

"The defendants, however, say that that valuation was made upon the basis of the current rates at which the ship was practically engaged, and that, as much less was ultimately obtained, the valuation should be opened, and be treated as being at a reduced rate.

"The plaintiffs, on the other hand, contend that the value agreed in the policy is the value of what actually was at risk on the voyage; and in support of that view they rely upon *Everth v. Smith* [1814], which they say shows that although the assured may take out a policy on freight generally with regard to what they then think will be the engagement of the ship, that policy will cover and attach to whatever is in fact freight on the voyage on which the ship sails, and I was referred to the following passage in the judgment of Lord Ellenborough: 'This was an insurance on freight generally, not on any specific freight; the charter-party is only material to show that upon the ship's arrival at Riga there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any "freight" is brought home, a loss has not happened for which he undertook to indemnify the assured.' In that case there had been freight earned, and therefore there had been no loss. At the close of his judgment he says, 'on the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure and the consequent inconvenience and expense arising from it are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured or a posterior freight makes no difference; if freight has been fully earned there can be no loss properly demandable of the underwriters.'

"It is clear that the court held that, in a policy in similar terms, the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms.

"I think, therefore, the policy in this case undoubtedly attached to the subject-matter at risk, and I now proceed to deal with the defendants' contention that the policy should be opened, and consequently, that there ought to be a reduction, based upon what was in fact at risk, and not upon the valuation. In support of this contention the defendants rely upon *Forbes v. Aspinall*, but that case is only an authority for a very well-known proposition, viz., that where both parties contemplate the freight insured to be on a full and complete cargo, and when, in fact, part cargo only is shipped, the freight on the part cargo is all that is at risk, so that there must be what is called an opening of the valuation. In strictness, it is not an opening of the valuation, but is merely a reduction in propor-

tion to the amount of cargo shipped, the valuation still being held binding as a valuation on that portion which is shipped.

"I think if the judgment of that case is looked at carefully, it will be seen to be based on the principle that both parties had agreed that the freight which was valued was the freight on a full and complete cargo, and that, as this full and complete cargo was not shipped, but only part shipped, the value of what was at risk must be taken in proportion to the whole cargo, and that applied to the actual valuation agreed upon. That case is no authority for the contention that if the value of what is about to be shipped, or the value of the freight on what is about to be shipped, is estimated too highly originally, and the assured is mistaken in his valuation, the valuation ought to be reduced. The truth seems to me to be that with regard to that case, which is referred to throughout the whole of the text-writers, and with regard to other cases of a similar kind, the freight upon what is not shipped is never at risk, and, therefore, to that extent the underwriter is not responsible.

"There are several cases which seem to me to be in point in dealing with this particular question, though they were not cited before me. For instance, one of the points put in argument by counsel for the defendants was, that if a cargo was about to be shipped under a policy in general terms on produce, and the assured could not ship as valuable a cargo as he at first intended and shipped a cargo of much less value, then the valuation would not be binding. The plaintiffs contended that it still would be binding.

"There is a case cited by the text-writers precisely on this point. It is referred to by Lowndes in his book on Insurance (2nd ed., sect. 32), thus: 'But excluding fraud and mistake, a valuation may be greatly in excess of the real worth of the thing insured and yet hold good. In a case not reported where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, valuing it at £11,000, and by chance she was loaded with palm kernels worth only some £3000, which were totally lost on the way home, he was allowed to recover the whole of the £11,000.' The reference he gives is *Co. of African Merchants v. Liverpool Marine Insurance Co.* I am not sure that the case quite bears out the statement made by the learned author, but M'Arthur in his book on Insurance (2nd ed., p. 70) cites (in support of the same proposition as Lowndes) the case as *Co. of African Merchants v. Harper* in 1872, giving the same reference and adding that the case is not reported, though I think that the case mentioned in the *Shipping Gazette* of 2nd December 1872 is another case.¹

¹ In *Maritime Notes and Queries* (edited by Sir W. Mitchell), part iv., December 1873, p. 222, 2nd col., appears the following:

"INSURABLE VALUE.—If an underwriter takes a premium on a valued policy he must stand by his loss, whether the interest is undervalued or overvalued. In the *Shipping and Mercantile Gazette* of 2nd December 1872 will be found the case of the *African Company v. Harper*. Lord C. J. Cockburn in that case said, 'If underwriters insure a ship and cargo for £13,000 which in the event of disaster may only sell for £45, they choose to take the insurance at so much, and it is their fault if it turns out that they were overvalued. No doubt those valued policies afford an encouragement to fraud; but where there is no fraud proved, the underwriters cannot reopen the valuation, and they must suffer.' Mr. Justice Blackburn confirmed these views, and stated that the House of Lords had decided that on a valued policy the valuation could not be disputed except in case of fraud."

"Upon the question of valuation there are two cases in the authorized reports which seem in point." (His Lordship then referred to the judgments of Willes and M. Smith J.J. in *Lidgett v. Secretan*; Willes J. in *Barker v. Janson*; and Patteson J. in *Irving v. Manning*, and continued.)

(At page 328) "These cases seem to me to be authorities for the proposition that, though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be erroneous, because of facts of which he had no knowledge at the time when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive and binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy.

"I hold, therefore, that the plaintiffs are right in maintaining that the policy covered the freight at risk on the voyage in question, and that the valuation is binding on both parties with regard to what actually came at risk under the policy, and that amount is £5500.

"The subordinate question in the case is, what amount the plaintiffs are entitled to recover. A sum of £952 : 3 : 9 was paid in respect of freight before the ship sailed. . . . The result is that that sum out of the sum of £3250 : 7 : 0 was not at risk, and therefore the valuation of £5500 must be reduced in proportion to the rule of three sum arrived at by the relationship of £952 to £3250, as stated in the judgment of *Williams v. North China Insurance Co.* and in the other cases cited. That, I understand from Counsel, it is agreed would leave the sum of £3889 as being the value of what was at risk, taking the valuation in the policy during this voyage, and as the sum of £3250 has already been paid by other underwriters, the amount which is recoverable from the present defendants will be reduced to £639. That figure, if my view of this case is correct—and subject to the premium of £15 paid into Court, and to the small addition of £4 : 7 : 6 by way of return of a proportionate part of that premium—is the amount for which the parties are agreed judgment must be entered."

Judgment for the plaintiffs.

MONTGOMERY & CO. v. INDEMNITY MUTUAL
MAR. INS. CO. (THE "AIRLIE") (1901)

i K.B. 147.

Marine Insurance—General Average—Assured owner both of ship and cargo—Liability of underwriters.

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss for which the underwriter of a policy of insurance on cargo against perils of the seas is liable, although the assured is the owner both of ship and cargo, and as between those interests there is in fact no contribution to general average.

Judgment of Gorell Barnes J. in the *Brigella* (1893) not followed.

The action was brought under a policy of Marine Insurance, subscribed by the defendants, at and from any ports or places on the

West Coast of South America to any port of call and/or discharge in the United Kingdom, on a cargo of nitrate, on board the ship *Airlie*. . . .

The plaintiffs were the owners both of ship and cargo and they claimed under the policy to recover a general average loss incurred by the cutting away of the ship's mainmast and rigging.

The ship sailed on March 29, 1900, and on May 17 encountered very bad weather with a heavy cross sea, and began to roll and lurch violently. About 9 A.M. it was noticed that the mainmast, which was an iron mast and hollow, had settled down. The rigging, which had slackened, was at once tightened by a process called "swiftering up," and the mast, so secured, remained firm in position. The ship continued to roll, and the master, after some time, fearing that the mast would break and fall on the deck and cause the loss of the vessel, thought it best to get rid of it. Accordingly, the vessel was brought into position, the windward rigging was cut, and the mast fell on the side, carrying away portions of the other masts and rigging. The wreckage was promptly cut adrift. The vessel was brought home under jury-rig, and reached her port of discharge in safety. It was found, when the cargo was discharged, that the mast was in no greater peril than the rest of the adventure. It had broken across about 12 inches from the keelson. The upper portion had crushed into the lower in telescope fashion and rested firmly and securely on the keelson.

MATHEW J. (at page 150): ". . . The first point made by the defendants was that there was no general average sacrifice. The mast, it was said, was already hopelessly lost, and therefore was not sacrificed for the safety of crew, ship, and cargo. But I cannot agree with this contention. The mast was not in such a condition that it must have been lost whether the rest of the adventure had been saved or not. It could not be said that the mast had no value, or that it was impossible to be saved. There was a chance of saving it, and that chance was thrown away for the safety of the whole adventure. The master would seem to have exercised his judgment reasonably, and it was not necessary that his view should be borne out by the facts when they came to be afterwards examined. For the defendants, reliance was placed on the case of *Shepherd v. Kottgen* [1877], where the mast was cut away, but it was held to have been already lost. There it appeared that the rigging had been loosened in the storm, and that all that was done was to anticipate by a few minutes an inevitable loss. The mast of the *Airlie* before the rigging was cut was firmly upheld, and could have stood and been saved if the master had not ordered it to be cut away. Upon the question of fact I am of opinion that there was a general average sacrifice.

"But the underwriters relied upon another defence, which raises a question of great importance. It was said that the loss of the mast did not give rise to a general average claim because the ship and cargo both belonged to the plaintiffs; and as there could be no contribution in fact there was no general average loss. The defendants relied on the case of the *Brigella*, which was said to be a judgment in favour of their contention. It was pointed out, however, that the opinion of the learned judge was not necessary to his decision, and I was asked to hear the case argued and give my judgment on the matter. I feel compelled to do so, though I have great reluctance to express an opinion on the matter which differs from that of Gorell Barnes J. The duty has probably been imposed upon me in order that, if the case should go further, it may be more

readily dealt with when the different views which have been held on the subject have been formally stated. It seems to me that a general average act is not affected by the consideration whether there will be a contribution or not. The sacrifice is made for the safety of those on board as well as of the ship and cargo. There is no contribution from those whose lives have been saved. Further, in such a case it has never been held, or so far as I know argued, that as between ship and freight there is no distribution of loss among the respective underwriters because both interests belong to the shipowner. It was not disputed that in the case of general average expenditure—as, for instance, the hire of a tug to extricate a ship from a dangerous position—there was a right to demand contribution from underwriters. The explanation offered on behalf of the defendants was that such expenditure was recoverable under the sue, labour, and travel clause. But that clause, it seems to me, stands clear of the insurance against general average sacrifice. Its object is explained by Lord Blackburn in *Aitchison v. Lohre*. It was not intended that the clause should afford an additional remedy for what was already sufficiently protected. Again, what is sacrificed in general average ought in my judgment to be treated in principle as lost by the peril averted. In the present case the loss of the mast must be regarded as a loss by perils of the sea—a loss not altered in its character by reason of a voluntary act intended to prevent more disastrous consequences. Accordingly, it has been held that a loss by general average cannot be added to a loss to the full amount insured, so as to cast a further liability on the underwriter—see *Aitchison v. Lohre*. One further consequence of the supposed rule would be that in the case of a joint ownership a jettison of cargo would leave the underwriter on cargo liable for the whole amount, without any right of contribution; and the concealment of the fact that the owner of the goods was also the owner of the ship might be treated as an objection to the insurance on the ground of the concealment of material fact. Here the policy of insurance is a policy against general average due to perils of the seas, and other losses of the same character; and if there was any question as to whether this loss was covered as general average it is certainly a loss of the same character. Although the point has not been dealt with in any other case than that of the *Brigella*, there is considerable authority for saying that the liability of the underwriter is not affected where insured interests are joint: *Oppenheim v. Fry*, 1863, per Blackburn J.; the two American cases—*Potter v. Ocean Insurance Co.*, and *Greeley v. Tremont Insurance Co.*; Phillips, s.s. 1274 and 1412. A man of business desirous of keeping a strict account of his transactions would allocate such a loss as this to his interest in ship and cargo in proportion to their respective values. There seems no reason why his underwriter should not be placed in the same position.

"It was agreed that the figures should be settled between the parties when the question of principle was determined. I give judgment for the plaintiffs with costs."

MONTGOMERY & CO. v. INDEMNITY MUTUAL
MAR. INS. CO. (THE "AIRLIE") (1902)
1 K.B. 734, COURT OF APPEAL

Marine Insurance—General Average—One owner of ship and cargo—Insurance of cargo—Liability of underwriters.

A loss caused by the cutting away of a ship's mast for the safety of the whole adventure is a general average loss to which the underwriters of a policy of insurance on cargo against perils of the sea are bound to contribute, although the assured is owner of both ship and cargo, and, therefore, as between those interests there can be no contribution to general average.

Decision of Mathew J. (1901), 1 K.B. 147, affirmed. Judgment of Gorell Barnes J. in the *Brigella* (1893) disapproved.

The action was brought upon a policy of insurance on a cargo of nitrate on board the ship *Airlie* bound from the west coast of South America to the United Kingdom.

The insurance was against perils of the sea and other losses of the same character, and the policy contained the usual sue and labour clause.

The plaintiffs were the owners of both ship and cargo, and they claimed under the policy to recover a general average loss incurred by the cutting away of the ship's mainmast. At the trial the questions raised were: (1) Whether upon the facts there was a general average sacrifice for the safety of the adventure; (2) whether the plaintiffs being owners of both ship and cargo, and there being therefore no possibility of contribution as in the case of separate owners, there could be general average.

Upon the question of fact Mathew J. held that there was a general average sacrifice, and upon this point there was no appeal.

Upon the other point the learned judge, differing from the view of Gorell Barnes J. in the *Brigella*, was of opinion that "a general average act is not affected by the consideration whether there will be contribution or not." And he held that the defendants were liable.

The plaintiffs claimed in the alternative under the sue and labour clause, but the learned judge did not deal with that claim.

The defendants appealed.

VAUGHAN WILLIAMS L.J. read the following judgment of the Court (Vaughan Williams, Stirling, and Cozens Hardy L.J.J.), at p. 738: " . . . The circumstances of the case are such as, it is admitted, would give rise to a general average claim if the ship and cargo belonged to different owners; but it is said that there can be no general average claim, because the ship and cargo both belonged to the plaintiffs; and as there could be no contribution there was no general average loss. Mathew J. has held that a general average act is not affected by the consideration whether there will be a contribution or not. This holding is contrary to the opinion expressed by Gorell Barnes J. in the *Brigella*; and we have now to consider which view is right. We agree with the view of Mathew J. (now Mathew L.J.), and moreover, we agree so entirely with the reasons which he has given for the conclusion at which he has arrived that we should not feel it necessary to add a word to those reasons if it were not that we think we ought to deal particularly with the reasons expressed by Gorell Barnes J. in his judgment in the *Brigella*,

and ought to state the principles upon which we think the law of general average loss should be based. As we understand the judgment of Gorell Barnes J., he is of opinion first that there cannot be a general average act or a general average loss unless there are separate interests in the maritime adventure, because contribution is of the essence of the maritime law of general average; and there cannot be contribution unless there is diversity of interests; and we understand him to go further and say that, even if there can be a general average act in a case in which ship, cargo, and freight belong to one adventurer only, yet the law of contribution cannot be applied, for the right of contribution only belongs to the adventurer who had an interest at risk against an adventurer whose goods have been saved by the general average act, and that it is impossible for an adventurer to enforce by legal proceedings a claim against himself in respect of the salvage of one part of his property by the sacrifice of another. It is said that such a right, if it existed, could only be enforced by the adventurer suing himself, which is impossible. It is said further that the fact that the ship, freight, and cargo have been insured with different underwriters can make no difference, because the only interest which the underwriters have is a subrogated right which they must enforce, if at all, in the name of the assured, as the owner of the property sacrificed by the general average act, against the same person as the owner of the property saved by that sacrifice. It is said that the obligation to contribute to general average exists between the parties to the adventure whether they are insured or not, and that the circumstance of a party being insured had no influence upon the adjustment of the general average. It seems to us that the question, whether contribution is of the essence of a general average loss or a mere incident of it, must depend upon the occasion which is a condition of such an act. It is not, we think, true to say that it is only the danger to ship, freight, or cargo which necessitates and justifies sacrifice by the master of either a portion of the cargo or a portion of the ship. This may be done in fear of death, and if it is done upon a proper occasion all must contribute to the loss. If there be one owner of ship, freight, and cargo, he will bear it all. If there be several, each will contribute according to the value of his interest. The object of this maritime law seems to be to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and in our judgment such a sacrifice is a general average act, quite independently of unity or diversity of ownership.

"Assuming that the general average act and the general average loss can occur independently of contribution, there still remains the question whether the underwriters on a policy on cargo can be held liable to pay to an owner of ship and cargo, by reason of his insurance of cargo, the contribution which the cargo-owner, if he had been another person than the shipowner, would have had to pay to the shipowner in respect of the general average loss incurred by cutting away the mast. It is said that the shipowner could not have recovered against himself as cargo-owner this contribution, and that, as the only liability of the underwriter on cargo is to pay as a general average loss a contribution which the cargo-owner could be compelled to pay, he has no obligation to recoup the cargo-owner a contribution which he has not paid, and could not be compelled to pay. In other words, it is said that as the cargo-owner has suffered

no loss, he can therefore claim no indemnity. If this is the true view, the converse view would also seem to be true—namely, that the underwriter on a policy on the ship must pay the whole of the ship's loss by the general average sacrifice without getting the benefit of any contribution from cargo belonging to the shipowner which had the benefit of the sacrifice. But we do not think that this is the true view. We will take first the case of the shipowner who has insured his ship, and there has been a general average sacrifice and loss by cutting away the masts to avert the instant perils of the sea. We will assume there is cargo on board belonging to the shipowner. What is the liability of the underwriter on the policy on the ship? It seems to us that his liability is to pay the loss incurred by cutting away the masts, less the contribution by the shipowner on account of the cargo. I see nothing in *Dickenson v. Jardine* to prevent this, because the shipowner has already in his pocket his own contribution as cargo-owner, and his loss is ascertained to be the cost of replacing the masts less his own contribution as cargo-owner. It will be observed that in *Dickenson v. Jardine* jettison was expressly covered by the policy, and the assured had not received the contributions of the other owners, and that therefore the underwriters could, upon indemnifying the assured, recover the contributions in his name, whereas in a case like the present the assured has in his pocket his own contribution, so that there is no contribution to be recovered, and the assured's loss has been *pro tanto* reduced before he makes any claim on the underwriters.

"But suppose he has effected a policy on cargo. What is the liability of the underwriters of the policy on cargo? Surely they are liable to pay the loss of the shipowner by reason of the deduction made by the underwriters of the policy on ship in respect of the shipowner's contribution as the owner of the cargo; and *mutatis mutandis*, a similar result is arrived at if the general average sacrifice is by jettison of cargo, and ship and cargo have a common owner.

"With regard to the right of the underwriter, when the assured is owner of ship and cargo, to deduct the contribution due from the ship or cargo, as the case may be, we will quote the words of Shaw C.J. in *Greeley v. Tremont Insurance Co.*, who, after stating that the underwriter is liable directly to the assured for a loss in its nature a general average loss, that is, resulting from a voluntary sacrifice, without waiting to collect the contributory shares from other persons, said: 'But the rule does not apply where the assured is owner of the vessel and cargo. Then as owner of the cargo, being bound to contribute, he is deemed to have the contribution in his own hands, and therefore is clearly *pro tanto* indemnified, and cannot collect of the underwriter a sum of money to be recovered back by the underwriter of himself.' It seems to us that this passage is quite right, and a working out of the principle on which the law of general average is based. This view seems to us to obviate any difficulty arising from the fact that a man cannot sue himself, and from the legal proposition that the only right of the underwriter in respect of collection of contributions is to sue in the name of the assured.

"There is nothing in this conclusion contrary to any English authority. It is true that no English case expressly decides the point. But there is a dictum of Lord Campbell in *Moran v. Jones* [1857], and an opinion of Blackburn J. in *Oppenheim v. Fry* [1863]. In the former case Lord Campbell said: 'And where there are separate

insurances on ship and freight, the calculation must be made as to the amount of contribution of each, although the whole of the freight which was in peril is to be received by the owner of the ship, and without insurance the whole loss would fall upon him.' And in the latter case Blackburn J. said : ' I think it is not necessary for the decision of this case to say whether the extraordinary expenditure was general average or not, though I have a strong impression that, where a voluntary sacrifice is made for the benefit of the whole adventure, it is general average, whether the ship and cargo and freight belong to one only or to different adventurers.' Against this there is the opinion of Gorell Barnes J. expressed in the *Brigella*. American authority, as we have already said, is strongly in favour of the view expressed by Mathew J., and the whole question is so well discussed by Story J. in his judgment in *Potter v. Ocean Assurance Co.* that we feel that it will illuminate the argument we have tried to express in this judgment if we quote a passage in which that learned judge deals with the question. It runs thus : ' But the argument is, that here there was no cargo on board and that there can be no contribution by freight or cargo, but the whole is to be borne by the ship ; and that therefore it is a particular average on the ship, and not a general average. The argument proceeds upon the ground that what is, and what is not, a general average does not depend upon the nature and objects of the thing done, or sacrifice made, for the general good, but solely upon the point whether there are in fact different contributory subjects. I do not so understand the law. As I understand it, the rule as to what constitutes a general average or not is founded upon the consideration whether it is for the benefit of all who are or may be interested in the accomplishment of the voyage, or only for the benefit of a particular party. Suppose a person to be owner of the ship and cargo and of course ultimately of the freight also, and he insures the ship, cargo, and freight in three different policies by different offices ; if a jettison should be made or a mast be cut away, or any other sacrifice be made for the common benefit of all concerned in the voyage, there can be no doubt that this would be a case of general average, and the underwriters on ship, cargo, and freight must all contribute as for a general average. What possible difference in such a case could it make that the same underwriters were underwriters in one policy on the ship, cargo, and freight ? or that the owner singly had no insurance at all, or an insurance upon only one of the subjects put at hazard ? Must not the loss still be treated in the contemplation of law as a general average or in the nature of a general average ? As I understand it, the phrase " general average," as found in our policies of insurance, is used in contradistinction to particular average. It means a voluntary sacrifice for the benefit of the voyage, and not merely an involuntary encounter of a loss without action or design. It looks to the efficient cause of the loss, and not to the effects of it. It looks to the consideration, whether the act is intended for the benefit of all concerned in the voyage, and not in particular to the consideration, who are to contribute to the indemnity. To be sure, if the owner stands as his own insurer throughout, the question degenerates into a mere distinction, for it is a pure speculative inquiry. Not so when there is an insurance ; for in such a case the underwriters are *pro tanto* benefited by the sacrifice or other act done, and they are in a just sense bound to contribute towards it.'

"We have only to add generally that, in our judgment, the underwriters have throughout the adventure such an inchoate property and liability to loss as to make it right within the true principle of the law of general average that upon the adjustment their right to contribution and their loss as underwriters, as the case may be, should be taken into consideration in the final account.

"Moreover, it is further well worthy of observation that the view of the law which we have taken agrees with the practice of average staters and underwriters both before and since the decision in the *Brigella*; and this practice is, in our opinion, really essential if the spirit of the law of general average is to be applied to the conditions of navigation at the present day. The appeal must be dismissed with costs."

MONTOYA v. LONDON ASSURANCE COMPANY (1851)

EXCHEQUER REPORTS, vol. vi. page 451.

Damage to cargo from other cargo sea damaged.

A vessel laden with hides and tobacco in the course of her voyage shipped large quantities of sea-water. On the termination of the voyage, it was discovered that the sea-water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill flavour to the tobacco, and had thereby injured it.

Held, that the damage thus occasioned to the tobacco was a loss by perils of the sea.

POLLOCK C.B. (at page 457): "We think it unnecessary to hear any further argument on the part of the plaintiffs. . . . Mr. Peacock has argued the case with much ingenuity, and the effect of his argument has been to cause some doubt where the precise limits of the responsibility of underwriters are to be fixed. . . . But it appears to me that no such doubt or difficulty exists in the present case, and I think, as fell from one of the members of the Court in the course of the argument, that, if the underwriters here would have been responsible for damage done to a cargo of corn, the lower part of which had been spoilt by direct contact with the sea-water and the upper by the fermentation of the lower part, the underwriters must equally be liable in the present case; for in truth there is no distinction between the two cases. It is a matter of no difference whether the whole of the cargo belongs to one person and consists of one entire package of corn, or whether the cargo consists partly of corn and partly of hides and is the property of several owners. . . . And I think it may be laid down as a general rule that where mischief arises from perils of the seas and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters, in such case, are responsible for the further mischief so occasioned."

Parke, Platt, and Martin BB. delivered judgments to the same effect.

NOTARA v. HENDERSON (1872)

L.R. vol. vii., Q.B. 225. IN THE EXCHEQUER CHAMBER.

Shipowner's liability for preservation of cargo.

There is a duty on the master of a ship, as representing the ship-owner, to take reasonable care of the goods entrusted to him, not

merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from the accident, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the B/L. And for neglect of this duty by the master the shipowner is responsible to the shipper.

The judgment of the Court (Kelly C.B.; Martin, Channell, and Cleasby B.B.; Willes, Byles, and Keating J.J.) was delivered by WILLES J. (at page 226): "This is an action by the shippers of beans on board a steamship called the *Trojan*, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs by an accident of the sea, from the direct and proximate effect of which the beans were wetted; and from the remote effects of which, for want of drying, they were further seriously damaged.

"The B/L was subject, amongst other exceptions, to the following, viz.: 'loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind excepted'; and it gives 'liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever.'

"The vessel in the course of her voyage stopped at Liverpool, and on 24th October 1868, on her way out, came, without any fault, into collision with another vessel. The result of the collision was that she was driven ashore in an exposed place, where the beans became soaked with salt water, and the vessel herself received an injury which made it necessary that she should put back to Liverpool for repairs. She was there put into a graving dock for that purpose on the 27th, and temporarily repaired in order to proceed to Glasgow. For the purpose of lightening the ship, and to facilitate the repairs, about one-fourth of the beans were transhipped into lighters, and for a like purpose other part was removed and spread out in the after part of the ship. When the ship was repaired, the beans were, without being dried or otherwise looked after, replaced in a wet state. On the 30th the ship proceeded to Glasgow. The beans were materially damaged by not being dried at Liverpool.

"The beans might, at Liverpool, have been removed to warehouse for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock. This would have caused a material benefit to the beans, and materially checked the process of decomposition. The expense of unshipping, drying, and reshipping, according to the finding in the case, which must be regarded as a finding of fact, would have been particular average, payable by the owner of the cargo; and that must be taken, therefore, to have been a reasonable and proper course to pursue, so far as the shippers' interest was concerned.

"It is not stated in the case what risk, trouble, expense, or delay the drying would have caused. . . . The Court below appear to have arrived at the conclusion of fact that the unshipping, drying, and reshipping of the cargo were, under the circumstances, as to time and otherwise, reasonable and proper as to be done by the person having charge of the cargo, assuming that there was any

legal duty imposed upon him to take active steps for that purpose. During the stay of the vessel at Liverpool, the shippers, who were on the spot, called the shipowner's attention, through their agents, also on the spot, to the state of the beans, and to the fact that they would be seriously injured unless dried at once, and they requested that either the beans should be taken out and dried, and then re-shipped for Glasgow, or that they should be delivered at Liverpool at a proportionate freight, so that the shippers might dry them themselves. The shipowners refused to accede to either alternative. They offered to deliver at Liverpool upon being paid the whole freight; but insisted that, unless the whole freight was paid, they had a right to retain and carry on the beans undried, and getting worse for want of drying as they were, in order to earn the whole freight upon arrival at Glasgow, provided the beans arrived *in specie*, whatever might be their condition.

"The shippers refused to pay more than the freight *pro rata*, and the shipowners took on the beans without drying them, and thereby occasioned further damage to the beans. . . . The remote loss caused by neglect to dry amounts to £666 : 1 : 5 . . . and for that amount they obtained judgment in the Court of Queen's Bench.

"Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage to the beans occasioned by the collision. . . .

"The question thus raised is a compound one of law and fact: first of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was under the circumstances of this case a breach thereof in not drying the beans.

"The law, up to a certain point, is clear and well settled by authority. The shippers, though upon the spot, were not entitled to the possession of the beans for any purpose without paying the full freight to Glasgow. The freight was not due, but the shipowners were entitled to retain the goods as a security for earning it. The offer of *pro rata* freight may have been reasonable, but it was one which the shipowners were not bound to accept; and it must be treated as an attempt to compromise, not affecting the rights of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect.

"It was argued for the shipowners that the fact of the shippers being on the spot negatived any implied duty on the part of the master as agent of necessity to take care of the goods, but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights and consequently the duties of the original bailment, whatever those might be. The shippers thereupon insisted upon the goods being properly taken care of by the shipowners, who retained control of them as a pledge for their freight.

"That a duty to take care of the goods generally exists cannot be

doubted ; and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk.

"It is remarkable that, upon a question so familiar to persons conversant with maritime affairs . . . the reported authorities in this country . . . should be so rare. The only case in which it was much discussed is that of *Tronson v. Dent* (1853).

(At page 232) : "This judgment of the Judicial Committee, though it does not define the duty of the master, does not disaffirm his duty to take reasonable care, whether passive or active, to save and preserve a cargo damaged by sea accidents.

"The effect of the decision appears to be that the duty of the master to use reasonable exertion to preserve the goods, if necessary by drying them, so as to make them capable of being taken on *in specie*, was recognized though the limits of the duty were left unsettled. It was suggested, indeed, that the duty of taking active measures, such as ventilating the cargo, ordinarily applied to doing so on board the ship, and that under no circumstances was the master bound to lay out 'a great deal of money' (limit not stated) in drying the cargo. It was assumed that the master was not bound, under the circumstances of that case, to delay beyond the time necessary for the repairs of the vessel. This assumption, however, can hardly be taken as intended for a proposition of law universally applicable, but rather as applicable to the circumstance that the opium then in question was only a part of the cargo, and that delay would be unreasonable to persons equally entitled to consideration as the plaintiff.

"The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accidents is, however, distinctly recognized in the maritime law in one particular . . . namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average. This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not nugatory. There is, however, this marked distinction, that the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees. This obligation on the part of the master has been commonly recognized, both in respect of preserving goods on board in a state of safety by pumping . . . and other proper means, and of saving goods which by accident have been exposed to danger."

After reference to the master's duty under foreign codes to preserve the cargo the judgment proceeds (at page 234) :

"There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest. As, for instance, in the case of a perishable cargo so damaged by salt water that it could not in its existing state be taken forward *in specie* to the port of discharge,

so as to earn the freight, but which could be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it or abandon it would give no right to freight *pro rata* against the owner of the cargo, nor any right to recover against the underwriter on freight. . . . It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo, by active measures if necessary, at the expense of the cargo, is owing only to the shipowner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state and in arresting the damage to which it has become liable by accidents of the sea, for the benefit of all who are concerned in the adventure?

"In the result it appears to us that the duty of the master in this respect is not, like the authority to tranship, a power for the benefit of the shipowner only to secure his freight (*De Cuadra v. Swann*), but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods entrusted to him not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction or deterioration by reason of accidents for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.

"The exception in the bill of lading was relied upon in this Court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of want of reasonable skill, diligence, and care, which want is popularly described as 'gross negligence.' This is settled so far as the repairs of the ship are concerned by the judgment of Lord Wensleydale in *Worms v. Storey* (1855); as to her navigation, by a series of authorities collected in *Grill v. General Iron Screw Collier Co.* (1868); and as to her management so far as affects the case of the cargo itself, in *Laurie v. Douglas* (1846), where the Court upheld a ruling of Pollock C.B. that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., 'ordinary and reasonable care.' These authorities and the reasoning upon which they are founded are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill and diligence, and that it is inapplicable to the case of a loss arising from want of such care, and the sacrifice of the cargo by reason thereof, which is the subject-matter of the present complaint.

"It was also argued that if there was any default of duty it was the fault of the master exclusively, and not of the shipowners. . . . The master is the general agent of the owners for the purpose of the voyage, and for the exercise of that agency is entrusted with powers, to be used at his discretion, in which the owner who elects him is satisfied to confide. If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, and it turns out that the facts do not warrant its exercise in the particular instance, as, for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts . . . and for a like reason they must be liable for his culpable omissions.

"For these reasons we think the shipowners are answerable for

the conduct of the master in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool. . . .

"It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. . . .

(At page 238) "We thus agree with the Court below that the duty exists in law, and that under the circumstances the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages."

PATERSON *v.* HARRIS (1861)

LAW JOURNAL, vol. XXX., Q.B. page 354.

The insurer against "perils of the seas" does not contract to indemnify against losses which MUST happen.

The purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case in which the loss or injury must inevitably take place in the ordinary course of things; and an insurance against "perils of the seas" does not cover an injury resulting from the ordinary action of the sea-water upon an article exposed to that action in such a state as inevitably to receive injury from it.

The plaintiff, being the owner of a share in the Atlantic Telegraph Co., a company formed for laying down a telegraphic cable between Great Britain and America, caused himself to be insured by a policy "from the United Kingdom, wheresoever the risk may commence, to the Atlantic Ocean and thence by one or more ships to the places of destination in the United Kingdom and America, including every accident and risk that may be incurred at sea or on land in all or any boats, ships, and crafts whatsoever and wheresoever, until the final and successful laying down of the cable from shore to shore, upon any kind of goods, etc., on any ship or ships, etc.; as above, beginning the adventure on the loading of the said goods." In the valuation clause the subject of the insurance was to be taken as "on one £1000 share in the Atlantic Telegraph Co., the said share valued at £1000; in case of loss, the part saved to be sold or appraised for the benefit of underwriters." The perils insured against were, *inter alia*, "of the seas." "All goods" were "warranted free from average under £3 per cent unless general." A memorandum was attached to the policy: "It is understood and agreed that this insurance shall cover and include the successful working of the cable when laid down." In attempting to lay down the cable, 373 miles of it were lost by perils of the seas. The cable was ultimately laid from the Irish to the American coast, but proved unworkable owing to the insulation of the electric wires being imperfect; this was caused by a defect in the outer covering of the cable, occasioned by an accident prior to loading, aggravated by the chemical action of the sea-water on the interior of the cable, to which, by the defect in the outer covering, the water was enabled to penetrate. The plaintiff having brought an action to recover damages for the deprecia-

tion in his share consequent on the failure, and also in respect of the loss of the 373 miles of cable.

Held: first, that the injury to the cable laid down was not caused by "perils of the seas"; second, that the insurance was in effect on the plaintiff's interest in the cable itself, and that the plaintiff might, therefore, recover in respect of the loss of 373 miles, but that the warranty clause applied and he could only recover if the proportion of the value of the part lost to that of the whole length when shipped free on board amounted to 3 per cent.

COCKBURN C.J. delivered the judgment of the Court consisting of Cockburn C.J., Crompton, Hill, and Blackburn JJ.

(At page 360) ". . . The purpose and effect of the policy was plainly to protect the insured against the loss of or injury to the cable (on the successful laying down of which the interest of the Company and its shareholders depended) from sea risk during the time it was carried out or being laid down between the opposite shores. . . . Although an electric cable extending from the Irish to the North American coast was finally laid down, it was found impossible to maintain electrical communication by means of it sufficient for telegraphic purposes, and the working of the telegraph was, at all events for the time, abandoned. A great depreciation in the value of the shares of the Company necessarily followed; and the principal question in the case is, whether the plaintiff is entitled to recover on this policy in respect of this loss. The cause of the failure was, beyond doubt, the imperfect insulation of the wire, arising from some defect in one or more places in the outer covering by which the wire is protected from external contact; and according to the finding of the jury, which was well warranted by the evidence and is not complained of, this defect was occasioned by accident prior to the shipment of the cable and the commencement of the risk, 'aggravated by the action of the sea.' Understood by the light of the evidence of the plaintiff's witnesses (none were called by the defendant), and of the contention of counsel at the trial, this finding of the jury must be taken to have reference to the chemical action of the sea-water on the interior of the cable, to which, by the defect of the outer covering at the time the cable was immersed in the water, it was enabled to penetrate, and not to any mischief done by the violence or mechanical action of the sea. This being so, we are of opinion that this is not an injury which can properly be referred to 'perils of the seas,' under which head of damage it was contended for the plaintiff that the loss fell. We are of opinion that an injury of this nature not arising from the external violence or mechanical action of the winds or waves, but which was the natural and necessary consequence of the ordinary action of the sea-water on the cable in the state in which it was when immersed in the sea, is not comprehended in the perils insured against. The injury, so far as the damage occasioned by the sea is concerned, was the inevitable consequence of the immersion of the cable in its then state in the sea-water. But the purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the sea, as being the unavoidable consequences of the service to which the vessel is exposed. The insurer

cannot be understood as undertaking to indemnify against losses which in the nature of things must necessarily happen. For these reasons, we are of opinion that the plaintiff is not entitled to recover in respect of this portion of his claim.

"A further question arises . . . in respect of a partial loss. In the laying down of the cable 373 miles of cable were lost, under circumstances which it is admitted would come under the head of perils of the sea. The question is whether the plaintiff is entitled to recover in respect of this loss, and if so, upon what principle the damages should be assessed. . . . It was further contended that the defendant was protected against this part of the plaintiff's claim by the memorandum of warranty against partial loss, inasmuch as the loss here could not amount to £3 per cent on the total value of the share. We at first doubted whether the warranty against partial average could apply to this case, but on further reflection, considering that the insurance, though nominally on the share, yet, for reasons which we shall afterwards more fully explain, is practically an insurance on the cable as being the tangible substance in respect of which alone the share could be exposed to the risk of sea damage, we have come to the conclusion that the warranty against partial average applies, and consequently that unless a loss of £3 per cent has been sustained the plaintiff cannot recover.

"In order to determine this question, as well as the principle on which the percentage of the loss is to be fixed, it becomes necessary to inquire more precisely what is the exact meaning of the contract contained in the policy on which the action is brought. (His Lordship referred to the terms of the policy). . . .

"Now it is obvious that the share in the Company itself was never capable of being put on board ships or steamers; nor was it directly liable to be lost in consequence of maritime risks, nor by any reasonable construction could the provision that 'in case of loss, the part saved should be sold or appraised for the benefit of the underwriters, be applied to the share in the Company: while, on the other hand, the proprietor of that share had an interest in the cable, to which all these phrases are applicable. It appears to us, therefore, that on the true construction of this policy the underwriters contract to indemnify the owner of that share against any losses arising to his interest in the cable, which interest is by agreement valued at £100.

"As soon as this is ascertained, this part of the case becomes mere matter of calculation. The value of the whole cable that ever was exposed to risk, including the portion lost, must be ascertained according to its cost when shipped free on board, that is the value of the whole that was at risk; and the proportion between that value and the loss actually incurred by the perils insured against gives the percentage payable by each underwriter in his subscription. In order to ascertain the amount of the loss, a distinction may properly be taken. That portion of the cable which was lost in the first attempts to lay down the cable and which it became necessary to replace by the new cable should be estimated at the cost of the substituted cable; for, as far as that is concerned, the parties interested have suffered the loss of the whole price which they paid to replace it. . . . If the arbitrator, estimating the percentage on this principle, should find that it amounts to less than £3 per cent, then, as, on the construction we have put on this policy, it is an insurance on the cable, that is on goods, the warranty, as we have

already stated, in our opinion applies and the defendant will be entitled to the verdict. . . .”

PEARSON *v.* THE COMMERCIAL UNION ASSOCIATION COMPANY (1876)

APPEAL CASES vol. i., HOUSE OF LORDS, page 498.

Time policy against fire—Effect of deviation.

A time policy against fire was effected on a steamship. The policy described it as then “lying in the Victoria Docks,” but gave it “liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy.” The only dry dock into which the ship could go was Lungleys’ Dock at some distance up the river. To go there it was necessary to remove the paddle-wheels; they were removed in the Victoria Docks, and the ship was then towed up to Lungleys’ Dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle-wheels. This operation could have been perfectly performed in the Victoria Docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle-wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt.

Held, that the policy covered the ship while in the Victoria Docks and while passing from them to the dry dock, and while directly returning from the dry dock to the Victoria Docks, but did not cover the vessel while moored in the river for a collateral purpose.

Per Lord Chelmsford: “An insurance against fire necessarily has regard to the locality of the subject insured.”

Per Lord O’Hagan: “To construe the policy as allowing the vessel to remain in the river while the paddle-wheels were replaced would be to add a new condition to the policy, which could not be done.”

The LORD CHANCELLOR (Lord CAIRNS) (at p. 502): “. . . The policy is a time policy for three months from 14th May 1862 till 14th August 1862. The insurance, however, does not protect the ship wherever it might be, or wherever it might be in the port of London. The ship is confined and localised for the purpose of the risk by these words: ‘Lying in the Victoria Docks, London, with liberty to go into dry dock and light the boiler fires once or twice during the currency of this policy.’

“The ship is therefore covered by the policy during the three months so long as it is lying in the Victoria Docks, and so long as it is in a dry dock, or at all events in a dry dock in the port of London. Nothing is expressly said as to the insurance attaching while the ship goes from the Victoria Docks into dry dock; but the Courts below have held, and it appears to me rightly held, that the liberty to go into dry dock necessarily carries with it the protection of the insurance while the ship should be in transit from the Victoria Docks to the dry dock and back again.

“I think, further, there can be no doubt that on the transit to and from the dry dock the ship would be at liberty to do anything and everything usual under the circumstances for the accomplishment of the end in view, namely, the transit to and from the dry dock. Any delay usual under the circumstances, any deviation usually

or conveniently made from the straight line, provided the delay and deviation are connected with and tend to the attainment of the end in view, would in my opinion be justifiable under the words of the policy which I have read. A delay or deviation of this kind would fairly come within the words of Lord Mansfield in the case of *Pelly v. The Royal Exchange Assurance* (1757) cited at your Lordship's bar, in which Lord Mansfield said: 'It is absurd to suppose that when the end is assured the usual means of attaining it are meant to be excluded.' If, on the other hand, a delay in the transit to or from the dry dock were to occur, not as part of the usual and ordinary means or mode of effecting the transit, but for some collateral object or purpose, then in my opinion, however usual and convenient a delay for the purpose of attaining that collateral object might be, the ship would not during the delay be covered by the policy.

"It is unnecessary to speculate whether the risk would or would not be greater while the ship was in the river than when it was in the dock. There is, it seems to me, evidence that the risk would be greater in the former case than in the latter, but it is sufficient to say that the respondents have defined the risk which they were willing to undertake, and that risk cannot be enlarged beyond the ordinary meaning of the words upon any theory that the difference of risk is immaterial."

After stating the facts his Lordship proceeds:

(At page 504) "It is found by the case that it is usual, after a ship whose paddle-wheels have been removed is taken out of dry dock, to moor it in the river for the purpose of replacing the paddles. And it is also found that though the paddles could have been replaced equally well in the Victoria Docks it would have cost four times as much as if done in the river.

"My Lords, I am clearly of opinion that the delay which was thus occasioned was a delay for a purpose altogether collateral. When the ship left the dry dock, the course, if it was wished to maintain the insurance, was to bring the ship back to the Victoria Docks; and I assume that anything done in the usual course towards the attainment of this end would be within the insurance. But that which was done did not in any way contribute to that end. It may have been usual, and because it was economical it may have been convenient, but it did not in any way facilitate or conduce to the transit of the ship to the docks from which it had come."

His Lordship thereupon proposed that the appeal be dismissed with costs, and Lords Chelmsford, Penzance, and O'Hagan delivered judgments to the same effect.

PICKUP *v.* THAMES & MERSEY MARINE INSURANCE COMPANY (1878)

QUEEN'S BENCH DIVISION, vol. iii. page 594, COURT OF APPEAL.

Unseaworthiness—Onus of proof removed from underwriter by shortness of time between sailing and discovery of unseaworthy condition of ship.

In an action on a policy of insurance it was proved at the trial that the vessel put back from inability to proceed eleven days after she started on her voyage: the judge directed the jury that the

time which elapsed between setting sail and putting back was sufficiently short to shift the onus of proof from the underwriters and make it incumbent on the assured to prove that the unseaworthiness arose from causes occurring subsequently to setting sail.

Held, affirming the judgment of the Queen's Bench Division, a misdirection.

Action on policy of insurance on freight. Pleas, amongst others: 1. That the ship was not lost by the perils insured against; 2. That the vessel was not seaworthy at the time of the commencement of the voyage.

The jury in answer to the learned judge found that the vessel was not seaworthy when she set sail from Rangoon upon the voyage insured, and that she was lost in consequence of her defective condition, operated upon by such weather as was to be expected on the voyage.

An application was made to the Queen's Bench Division for a new trial on the ground of misdirection, and on the application being granted the defendants appealed.

The vessel arrived, in ballast, at Rangoon on the 25th April, 1874, to load a cargo of rice for the United Kingdom, the freight being the subject-matter of the insurance. The vessel was admitted to be seaworthy at the commencement of the voyage from Galle to Rangoon. She remained at Rangoon until the 4th June following, when, having loaded her cargo, she set sail on the homeward voyage. Between the 9th and 15th June she encountered severe squalls and a heavy sea, and laboured heavily and made so much water that the master and crew, becoming alarmed for the safety of the ship and satisfied of her inability to perform the voyage home, determined on putting back to Rangoon. On the 19th June, when in the Rangoon river, she grounded, but was got off again and proceeded to Rangoon, where she arrived on the 20th June. During July surveys were held and she was found to be very much strained and, in several places where her copper was off, to be very much worm-eaten, and on the 15th July she was pronounced to be unseaworthy, and there was no contest as to her having been so at that time. The question was whether the rough weather she had encountered between the 9th and 15th June, and the straining thereby occasioned, had caused her leaky condition—in which case that condition would have been consistent with her having been seaworthy on starting on the voyage—or whether her leaky state had been brought about by the action of the worms which, from the defective condition of some parts of her copper, had been able to eat their way into her planks so as to render many of them in an unsound condition.

The defendants contended that this worm-eaten condition must have arisen during the period the ship was loading in the Rangoon river from 25th April to 4th June; the plaintiff contending her leaky state was due to the weather she had encountered and her worm-eaten condition had been produced during her stay at Rangoon between 20th June and 15th July, the waters there being greatly infested with the species of worms by which wooden vessels are liable to be attacked, and which, owing to portions of her copper having been rubbed off on the occasion of her stranding, had been thus enabled to get at the vessel.

BRETT L.J. (at page 599): "I agree with the judgment of the Queen's Bench Division.

"A good deal has been said on the argument about 'the burden of proof' and 'presumption.' The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant and, so far as the pleadings go, it never shifts, it always remains upon him. But when facts are given in evidence it is often said certain presumptions, which are really inferences of fact, arise, and cause the burden of proof to shift; and so they do, as a matter of reasoning and as a matter of fact; for instance, where a ship sails from a port and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started; and a jury may be properly told that, upon such uncontradicted evidence, they may presume as a matter of reasoning and inference from the facts the vessel must have been in an unseaworthy condition when she started, that is, when she started she was not in a fit state to encounter the ordinary perils of the voyage; and if a jury, with no other evidence than that I have stated, were to find the contrary, it would not be a finding against any principle of law, but it would be such a finding against the reasonable inference from the facts that it would amount to a verdict against evidence. And as a guide on the question of fact, and the mode in which the jury are to draw inference, I think the jury might be told what is laid down in 2 Arnould on Marine Insurance (5th ed.), page 666, namely, that where a ship becomes so leaky or disabled as to be unable to proceed on her voyage soon after sailing on it, and this cannot be ascribed to any violent storm or extraordinary peril of the sea, the fair and natural presumption is that it arose from causes existing before her setting out on her voyage, and, consequently, that she was not seaworthy when she sailed. That is only telling them, if no other facts are shown, 'I should advise you as reasonable men to find that the ship was unseaworthy when she started.' But the passage in Arnould proceeds to lay down that in such cases it is incumbent upon the assured to show that at the time of her departure she was in fact seaworthy and that her inability has arisen from causes subsequent to the commencement of the voyage. Of course, he may be able to show that she was seaworthy. But the question what is a short time after sailing must surely depend on the circumstances; and it is for the jury to say whether under the circumstances of the voyage they think the time of loss was so soon after sailing that it raises the presumption of unseaworthiness.

"Let us see whether there is any authority to the contrary. The case cited to us is *Watson v. Clark*, 1813. That case is more often cited for the question of law which Lord Eldon enunciated than for his treatment of the facts. It is cited as an authority for the principle that if a ship was seaworthy at the commencement of the voyage, although she became otherwise only one hour after sailing, the warranty is complied with, and the underwriter is liable. The case also deals with the question of presumption arising from the facts. . . . But I never heard that this case was an authority for showing that a proposition of fact is really a proposition of law.

"Now, if that be so, I think it cannot be denied that my Brother Field so expressed himself that the jury would consider themselves bound to take it as a matter of law that it was a short time, and a time so short that it shifted the presumption. But my Brother

Field, who was a party to the judgment of the divisional court, on consideration admitted that his direction was erroneous.

"As to the question arising upon the issue as to the loss by perils of the sea, it seems to me upon the facts of this case that when the jury were practically told that as a matter of law they were to take it that she was worm-eaten at Rangoon, unless the shipowner could show that she was not, that this direction must have had a vital effect upon the finding of the jury upon the loss by perils of the sea, and that therefore, though as an abstract proposition this would not be a misdirection upon that plea, it was such a direction as to lead to a wrong inference of fact; it was such a wrong direction that it would almost inevitably lead to an erroneous consideration of the issue and cannot be satisfactory. Therefore, I think there must be a new trial."

Cotton and Thesiger L.J.J. delivered judgments to the same effect.

PITMAN v. THE UNIVERSAL MARINE INSURANCE COMPANY (1882)

QUEEN'S BENCH DIVISION, vol. ix. page 192, COURT OF APPEAL.

Damaged ship sold during course of risk—Measure of indemnity is the depreciation in ship's value.

When a ship that is insured is injured by perils insured against, and the owner instead of repairing sells her during the continuance of the risk, the loss to be made good by the underwriters depends on the depreciation in the value of the ship and not on the amount it would have cost to repair her, with an allowance in respect of new materials for old.

The estimated cost of repairs, though rejected as a direct measure of loss, might be the measure of the difference between the ship's sound and damaged values if no other means can be found for arriving at the loss really sustained.

The depreciation in value is to be ascertained by taking the value of the ship, if sound, at the port of distress, and her value there in her damaged condition. To ascertain the liability of the insurers, the proportion so arrived at should be applied to the real value of the ship at the commencement of the risk, if the policy be open, or to the agreed value if the policy be valued:

So held by Lindley J. (except as to the mode of ascertaining the depreciation in value), and on appeal by the majority of the Court: Jessel M.R., and Cotton L.J.; Brett L.J. dissenting.

Held, by Brett L.J., that the matter against which the owner was indemnified was the cost of repairs, and not any diminution in the saleable value of the ship, and that therefore loss or gain by the sale of the ship was outside the contract of insurance and was not a matter to be considered between the assured and the underwriter in adjusting either a total or a partial loss on ship.

The plaintiffs were the owners of the barque *Thracian*, and by a policy of insurance bearing date 3rd June 1875, caused themselves to be insured for twelve calendar months upon the ship valued at £3700. The defendants subscribed the policy for £1000, and it was agreed by memorandum that the insurance should commence from the 23rd March 1875.

The vessel sailed under charter from Singapore to Moulmein on

the 24th July 1875, and in passing up the river to the port of Moulmein took the ground on the 10th August 1875, and remained aground until the 14th August, when she was got off and towed up to Moulmein.

The plaintiff determined to abandon the vessel and gave notice of abandonment, but the underwriters declined to accept it. The plaintiff then, having made some slight repairs, sold the ship and stores for £3897.

In the statement of claim the plaintiff alleged that the value of the ship at the commencement of the risk was £4000, and that she was injured by perils insured against by the policy, and claimed £781 : 7 : 10 as a partial loss under the policy. The defendants paid £245 into Court.

The case was tried in May 1881 before Lindley J., who reserved for further consideration the question upon what principle the loss was to be ascertained, and on 11th July 1881 delivered judgment as above. The plaintiffs appealed.

COTTON L.J.: "This is an action by the owners of a vessel insured by the defendants, and the only question on the appeal is the amount which the plaintiffs are entitled to recover on their policy. The vessel during the subsistence of the insurance was materially injured by perils of the sea. The repairs necessary to make good the injuries were estimated at a large sum, and the owners at first claimed to treat the case as one of constructive total loss, but this was objected to by the insurers, and the owners abandoned this contention. They then began to repair the vessel at Moulmein, but, instead of executing the repairs necessary to restore the vessel to as good a condition as before the injury was sustained, they had some of the most necessary repairs done at a comparatively trifling expense, and then during the continuance of the risk covered by the policy sold the vessel at that port. It realised a large sum, and the judgment of the Court below has given the plaintiffs only the difference between the value of the ship in its uninjured state and the sum realised by its sale, after deducting from this latter sum the cost of the repairs which were in fact done. The plaintiffs claim to be entitled to recover the estimated cost of the repairs necessary entirely to make good the injury sustained by the vessel less the usual allowance of one-third of the cost, which would give the plaintiffs a very much larger sum than they can recover under the judgment appealed from.

"As a general rule, where there is a partial loss in consequence of injury to a vessel by reason of perils insured against, the insured is entitled to recover the sum properly expended in executing the necessary repairs, or, if the work has not been done, the estimated expense of the necessary repairs, less in each case where the vessel was not at the time of the injury a new one the usual allowance of one-third new for old. But in the present case the assured, before the determination of the risk, by their voluntary act showed that they did not desire to restore the ship to the same condition as before the injury, and rendered it impossible that the repairs of which they seek to recover the expense should ever be executed by them. . . . A policy of marine insurance is a contract of indemnity. In case of partial loss when repairs are in fact executed, the sums expended in repairing the ship in a reasonable and proper way are damages sustained by the insured by reason of the perils insured against, and a natural consequence of such perils; and the insured is entitled by way of indemnity to the cost so incurred, after deducting in the

case of a vessel not new at the time of the injury one-third of the expenditure, this deduction being made to prevent the insured getting a benefit by reason of his ship being repaired with new materials in place of old. . . . By properly expended in repairs I mean expended in executing the necessary repairs in a reasonable and proper manner.

"Where in a case of partial loss the owner has not repaired the vessel, he is entitled to have made good to him the depreciation at the end of the risk in the value of his vessel, so far as this is caused by the peril insured against. This is the present case, and we have to determine on what principle this deterioration is to be ascertained. As a general rule, the estimated cost of the repairs is the measure of deterioration, but, to use the language of Maule J. in *Stewart v. Steele* (1842), 'The insured must recover the expenses not *eo nomine* as expenses, but as the measure of the loss.' But it is urged by the appellants that the estimated cost of repairs with the deduction of one-third new for old in the case of ships not new, is the established and settled measure of damages to be recovered by an insured shipowner where there is a partial loss, and the ship has not been repaired. The judgment of Lord Campbell in *Knight v. Faith* (1850) and the decision in *Lidgett v. Secretan* (1871) have been relied on in support of this contention. In the former case the policy was a time policy for a year, and the ship sustained injury during the year by perils insured against, and after the expiration of the year was found to be in such a state as to be a constructive total loss, and was sold for a very small sum. The Court there held the defendants not liable for the total loss. . . . But there the plaintiffs had not before the expiration of the risk elected not to repair but to sell the ship, and the sum which the repairs would have cost was the only available measure of deterioration at the expiration of the risk. In *Lidgett v. Secretan*, the vessel was insured by two policies. A partial loss was incurred during the period covered by one of the policies, and after that had expired, and while the ship was being repaired, a total loss occurred by the ship being burnt during the period covered by the second policy. The Court decided that under the first policy the estimated cost of repairs which had not been done when the total loss occurred was to be taken into account in ascertaining the amount recoverable under the first policy. Here again this was the only measure of depreciation of the vessel by the injury sustained during the first policy. But the judges who decided that case do not say that the estimated cost of repairs not executed is necessarily in all cases to be taken as the measure. M. Smith J. says: 'The cost of the repairs would be *a mode* (not *the mode*) of estimating the amount by which the vessel was depreciated by striking on the reef,' and Willes J. says, 'The only question we are asked to decide is what are the true principles upon which the loss is to be assessed? The true principle I apprehend to be this: The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of diminution in value of the vessel at the end of the first risk, the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result I do not see how the arbitrator can avoid taking into consideration the expenses which would have been incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of value at the expiration of the risk.'

"These cases, in my opinion, do not help the appellants' contention,

and the decision in *Stewart v. Steele* is against them. . . . The authorities therefore, in my opinion, do not support the contention of the plaintiffs that the estimated cost of repairs, less one-third new for old, is necessarily the measure of the sum to be recovered by the insured, and the reasoning and expressions used by the judges in the cases tend strongly to show that the estimated cost of repairs which have not been executed is a method, but not under all circumstances the only method, of estimating the deterioration of the vessel. To hold that in the present case the insured is entitled to recover two-thirds of the estimated cost of repairs would be contrary to what is one of the principles applicable to all insurance cases, that the policy is a contract of indemnity, or, to adopt the words of Willes J. in *Lidgett v. Secretan*, the assured is not entitled to recover more than he lost by the injury sustained by the vessel through the perils covered by the policy.

"In this state of the authorities, I am of opinion that the estimated cost of repairs, less the usual allowance of one-third new for old, is not under all circumstances the sum which the assured is entitled to recover. Where, as in the present case, there is not a constructive total loss, he is not as against the insurers entitled to sell so as to bind them by the loss resulting therefrom; but when he elects to take this course, as in the present case, he, as against himself, fixes his loss, that is, he cannot, as against the underwriters, say that the depreciation of the vessel exceeds that which is ascertained by the result of the sale. Probably the most accurate way of stating the measure of what under such circumstances he is to recover is that it will be the estimated cost of repairs less the usual deduction, not exceeding the depreciation in value of the vessel as ascertained by the sale.

"It was urged that the judge in the Court below had no sufficient evidence of what was the value of the vessel at Moulmein in its undamaged state. But this objection cannot, I think, be sustained, and as he found that this value was the same as that of the vessel at the commencement of the risk, the question as to the proper mode of estimating, from the sale, the depreciation of the vessel does not, I think, arise. It must be observed that in the present case some repairs had been done to the vessel before it was sold, and these have been allowed to the plaintiffs; for, notwithstanding criticisms on the wording of the judgment, I think that it directs the cost of these repairs to be subtracted from the proceeds of the sale before these proceeds are deducted from the value of the ship when uninjured, so as to fix the amount of deterioration.

"In my opinion the judgment appealed from is right, and the appeal must be dismissed."

Jessel M.R. delivered judgment to the same effect.

Brett L.J. delivered judgment, allowing the appeal, that the plaintiffs were entitled to the estimated reasonable cost of repairs.

PRICE *v.* AIR SHIPS SMALL DAMAGE INSURANCE
ASSOCIATION (1889)

QUEEN'S BENCH DIVISION, vol. xxii. page 580, COURT OF APPEAL.

*General and particular average loss cannot be combined to attain
the franchise in the policy.*

Under the memorandum in a marine policy, by which the subject-matter of insurance is warranted free from average under a certain

amount per cent, unless general, or the ship be stranded, sunk, or burnt, a general average loss cannot be added to a particular average loss to make up a loss amounting to a specified percentage.

A ship was insured by a policy expressed to be against all losses, which could not be recovered under an ordinary Lloyd's policy by reason of the insertion therein of the memorandum against average under 3 per cent unless general, or the ship be stranded, sunk, or burnt. The ship while covered by the policy, through stress of weather, incurred a particular average loss; and further damage to her was incurred under circumstances such as to constitute a general average loss. The particular average loss did not amount to 3 per cent of her value, but the general and particular average losses taken together did amount to such percentage:

Held, that the assured were entitled to recover the particular average loss under the policy.

LORD ESHER M.R. (at page 583): "In this case the action is against the insurers on a policy which is expressed to be against all losses, which cannot be recovered under an ordinary Lloyd's or other similar policy by reason of the insertion therein of the clause 'warranted free from average under three pounds per cent unless general, or the ship be stranded, sunk, or burnt.' There has been a loss; but the defendants say that this loss is not covered by the policy because it could be recovered under the ordinary form of policy with that clause inserted. The question is whether that contention is correct. The loss occurred thus: by reason of bad weather damage was done to the ship, and then, in consequence of what happened, further loss had to be incurred for the good of cargo and ship. The first loss was clearly an average loss on the ship, and the further loss incurred for the good of the ship and cargo was undoubtedly a general average loss. The particular average loss on the ship taken by itself falls below 3 per cent of the ship's value, but if the general average loss can be added to it, then the sum of the two taken together exceeds 3 per cent of the value. The question therefore is whether under the ordinary Lloyd's policy containing the memorandum, in order to see whether the loss exceeds or falls short of the specified percentage, a general average loss on the ship or goods, as the case may be, can be added to a particular average loss on the same ship or goods. That question depends on the true construction of the memorandum or warranty in question. Now to say that the language of these Lloyd's policies can be construed altogether according to strict grammar is, as has often been observed, next to impossible. The phraseology used in them is in many respects regardless of grammar, but the meaning of it has been understood for many years among shipowners and mercantile men in a certain sense. Still, one must examine the language of this memorandum or warranty, and construe it, having regard, as far as possible, to ordinary rules of grammar. The usual form runs as follows: 'Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general, or the ship be stranded: sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent, unless general, or the ship be stranded.' Pausing there, how would these words be read, having regard to their grammatical construction? 'Average' as used in this connection is clearly a technical expression, and it has a well-established mercantile signification. It means a partial as distinguished from a total loss. If there is a total loss of the whole of the things mentioned, or of the whole of any one of them, or a

total loss of any part which is so put on board as that there can be a total loss of that part, the clause will not apply to that loss. Taking 'Average' then to mean average or partial loss, the meaning is that certain articles mentioned are warranted free from partial loss, or partial loss under a certain percentage, unless it be a general average loss, that is to say, a loss voluntarily occasioned for the safety and benefit of the common enterprise. Considering the nature of the articles enumerated in the clause and that they are of entirely different kinds, and do not come from the same places, and it is consequently absurd to suppose that there would be a cargo including all of them on board the ship, and considering that this is a common form intended for general application, it seems to me to follow that the application of the clause must be contemplated although the whole of these articles mentioned are not on board, or even if only one of them is on board. Having regard to the grammatical construction of the clause, and still more to the ordinary business view of the matter, it seems to me that on the face of the thing each of the articles mentioned must be taken separately for the purpose of applying the clause. . . . Therefore I should say that reading the clause as grammatically as one can it means that sugar is warranted free from average under 5 per cent unless general; and so on with regard to each article mentioned. Then we come to the portion of the clause which warrants other goods and also the ship and freight free from average under 3 per cent unless general, or the ship be stranded. That must, as I have said, in my opinion be read as equivalent to 'warranted free from partial loss under 3 per cent, unless it be a general average loss.' Upon that reading of the words, the conclusion, as it appears to me, must be that if the ship suffers partial loss under 3 per cent, which is not general average, such loss cannot be recovered under the policy. If there be a general average loss that can be recovered, although it is below 3 per cent; but the particular average and the general average cannot be added together."

(After referring to the works of Arnould, Stevens, and Phillips, and the American case of *Padelford v. Boardman* as authorities in support of his construction, the judgment proceeded.)

(At page 588) "Nothing could be more distinct than this decision which is to the same effect as the passages in the marine text-writers to which I have referred. I come to the conclusion, therefore, that general average and particular average losses cannot be added together in determining whether there has been a loss amounting to 3 per cent. As to the general average loss it does not signify whether it is over or under 3 per cent. As to the particular average loss it cannot be recovered under the Lloyd's policy if it is under 3 per cent, and therefore, as the particular average loss in this case is under 3 per cent, and therefore cannot be recovered under that policy, it comes within the terms of the policy effected with the defendants, and the case must be determined accordingly. . . .

"For the reasons I have stated I am of opinion that the decision of Cave J. was correct, and that this appeal must be disallowed."

Fry and Bowen L.J.J. delivered judgments to the same effect.

RANKIN *v.* POTTER (1873)LAW REPORT, ENGLISH AND IRISH APPEALS, vol. vi. page 83,
HOUSE OF LORDS.

Chartered freight.

Per Charter-party, entered into a month after the vessel had sailed, between Messrs. Potter, the owners, and one De Mattos, the charterer, the *Sir William Eyre* was to proceed to New Zealand, with cargo for owners' benefit, thence to Calcutta, where she would load a cargo to be provided by De Mattos at a stipulated freight for Liverpool or London.

The owners insured the vessel and chartered freight, the policy sued on being for "£4000 on homeward chartered freight," "lost or not lost at and from Clyde to Southland while there, and thence to Otago (New Zealand), and for thirty days in port there after arrival."

The vessel arrived at Bluff Harbour, Southland, on the 23rd April 1863, and, having grounded on various occasions during her stay, sailed on 1st July for Port Chalmers, Dunedin, where she arrived on the 4th July. Surveys were held on the vessel at both places, but there being no dry-dock facilities, the damage to bottom, if any, could not be ascertained, and the surveyors recommended the vessel to be dry docked for examination of her bottom at the first convenient opportunity. The vessel remained at Dunedin waiting funds, which were received in February 1864, when some temporary repairs were effected as recommended by the surveyors, and on the 14th April 1864 she proceeded in ballast for Calcutta, where she could be dry-docked and complete repairs effected. She arrived at Calcutta on the 7th June 1864, where she was tendered to the charterer's agents who refused to load her owing to the charterer having failed. She was then dry-docked and surveyed, when it was ascertained that the damages sustained were such as to justify claim for a constructive total loss of the ship. The assured received full advices of the damage and estimated cost of repair in August 1864 (dated Calcutta, June 1864), and gave notice of abandonment to underwriters on ship and freight which was not accepted. Claim was made for a total loss of the chartered freight which was defended on the ground that the notice of abandonment was not given within a reasonable time.

Upon trial before Lord Chief Justice Bovill, a verdict was entered for the defendant with leave to move to enter it for the plaintiff. A rule obtained for that purpose was discharged, but in the Exchequer Chamber was reversed and this appeal was brought by the defendant underwriter.

It was admitted, by paragraph 24 of the case, that the damage sustained at New Zealand during the time covered by the policy was such as would have justified an abandonment and claim for a constructive total loss.

Held, that there was a loss of freight occasioned by the perils insured against, that no notice of abandonment to underwriters on freight was necessary, and that if notice of abandonment to underwriters on freight had been necessary the notice would not under the circumstances have been too late.

The judges were summoned and Martin and Bramwell BB., Blackburn, Mellor, Keating, and Brett JJ. attended.

The following questions were put to the judges :

1. Was there a loss by perils insured against during the term of the policy ?
2. Was notice of abandonment either of ship or freight or both necessary to enable the plaintiffs to recover for a total loss on the policy on freight ?
3. If notice of abandonment was necessary, was the notice given in time ?
4. If notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, does the want of due notice as to the ship affect the right of the plaintiffs upon the policy on freight ?
5. Was there any such conduct on the part of the assured after the time of the alleged constructive total loss of ship as discharged the underwriters from their liability upon the policy on freight ?
6. Ought the judgment to be for the appellants or the respondents ?

BRETT J. (at page 97), after describing the subject-matter of the insurance and the voyage insured, continued :

" This is a different voyage from, and does not comprise any part of, the voyage on which the charter-party freight can be earned, which latter is a voyage from Calcutta to Liverpool or London. The subject-matter insured then is freight ; the freight insured is not any, but one particular freight ; it is not freight which might be earned on the voyage insured or part of it ; the goods in respect of the carriage of which the insured freight may be earned cannot be at risk during any part of the voyage insured, and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. . . . "

(At page 98) " It seems to me convenient, in the next place, to consider what does or does not amount to a loss, and what amounts to a total loss under ordinary policies on freight. On an ordinary policy ' on freight ' in general terms there is no loss at all on freight for which the underwriter on freight is liable by reason of partial damage to the ship, however great, causing an average loss on a policy on ship or of partial damage to cargo, causing an average loss, on a policy on ship or of partial damage to cargo, causing an average loss, however great, on the cargo generally under a policy on goods. There is a partial loss of freight under a general policy on freight, if there be a general average loss caused by a peril insured against giving rise to a general average contribution ; or under certain circumstances if there be a total loss of part of the cargo ; or if in case of total loss of the ship the cargo be sent on in a substituted ship ; or if in the case of a total loss of the cargo the ship earns some freight in respect of other goods carried on the voyage insured. There may be an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless, when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured. "

" It has become a question in this case whether there may not be on a general policy on freight another kind of actual total loss, namely, by such damage to the ship as would justify notice of abandonment, and make thereupon a constructive total loss of ship under a policy on ship, although there be no loss of cargo, or an average loss of cargo without means of sending on the cargo. In such a state of things the ship may or may not be insured ; if the ship be insured, due notice of abandonment of ship may or may not have been given. If the ship is not insured what must happen on the assumption ? The assumption is that a prudent owner will not repair. Then the ship will not be repaired. If not repaired it will remain a wreck or be sold as a wreck. It cannot therefore sail on the voyage insured in the policy on freight. Then such freight is and must be in fact absolutely and totally lost. There is no freight, no chance of freight, to abandon to the underwriter on freight. It has never been suggested that the ship should be abandoned to the underwriter on freight. There is nothing then which can be abandoned to him of which he could take possession, or from which he could derive profit. If the ship is insured, and due notice of abandonment given to the underwriter on ship, the property in the ship passes to the underwriter on ship. In such cases the new owner of the ship will in almost every case sell it as a wreck. Again, there would be nothing and no chance of anything to abandon to the underwriter on freight. If from exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship ; none of it could go to the underwriter on freight ; but freight would have been earned on the voyage insured in the policy on freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your Lordships' House that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable : *Scottish Marine Insurance Company v. Turner* (1853). . . .

(At page 101) " In determining then the construction of the policy on freight as to liabilities and rights under it, it must be immaterial whether the assured on a policy on the ship has lost or made perfect his right to recover on that policy for a constructive total loss of ship by failing to give or giving due notice of abandonment under that policy.

" The only question is, whether there is any implied contract or condition in the policy on freight under any of the states of circumstances above mentioned where there is any loss of freight, imposing upon the assured under that policy the obligation of giving notice of abandonment to the underwriter of that policy. And it was to meet this question that the arguments were propounded at the Bar with regard to the reason for giving notice of abandonment. On the one side . . . founded on the assertion that notice of abandonment need not be given where there is nothing to abandon, where there is not anything and no chance of anything which can pass or be of value to the abandonee. On the other side . . . that if the thing insured could be said to exist *in specie*, notice of abandonment of it must be given, although it could not pass to the abandonee, and he could not derive any value from it. This argument took the form of asserting that the notice is required in order to signify an election by the assured, or to give an opportunity for inquiry to the under-

writer. . . . It may, however, be that they are consistent, and that where there is anything to abandon the caution of great merchants and lawyers has, by usage, engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given and given quickly, both in order to signify the election of the assured and to give the underwriter opportunity for inquiry and action, but that where there is nothing to abandon, notice of abandonment being futile is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to that end to prevent the assured from having at the same time payment in full of the sum insured, and the thing insured, a thing of value, in his hands. It may be that it is as an incident of the rule, and in order to secure its application, that the assured, where he must abandon in order to recover the full sum insured, must give quick notice of his intention to abandon. . . .

"I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or, if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go to the length of determining that there can never be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight.

"Another form of policy on freight, not unusual, but not so frequent as a policy on freight in general terms is a policy insuring 'chartered freight.' In such policies the voyage insured commences usually at or from the port of sailing on the voyage described in the charter-party, or on or at the commencement of the voyage the ship must make to reach that port; but in both cases the voyage insured usually covers also the whole voyage to be sailed under the charter-party. Such a policy attaches earlier than a policy on freight on general terms; it attaches before any goods are on board the ship. If the ship be lost or damaged, or the cargo lost after the goods are on board, the same circumstances must arise, and the same considerations apply as have been related and treated of in the case of a policy on freight in general terms. Before any goods are shipped the loss can occur solely by reason of damage to the ship; but if the ship be then actually totally lost, or so damaged as to be possibly a constructive total loss, so much of the above reasoning as is applicable

to a loss by damage to the ship seems to be equally if not more cogent to show that no part of the charter freight could possibly be earned by the assured, that there would be no freight or chance of freight to be abandoned, and, therefore, that no abandonment or notice of abandonment would be necessary, but that the loss of the chartered freight would be an actual total loss under the policy on freight.

“ These considerations and this inquiry into the rules applicable to ordinary policies on freight seem to me to determine what must be the decision on this unusual policy on freight under the circumstances which have happened. The questions raised are whether there is any loss of freight by a peril insured against, and, if so, is that loss a total loss ? The ship was damaged during the voyage insured ; it was damaged by a peril insured against. Unless the damages to the ship should be wholly or sufficiently repaired, the insured freight could not be earned. If the damage to the ship could not be sufficiently repaired to enable the assured to earn the charter freight by carrying goods on board that ship, it seems to me that the damage to the ship caused by a peril insured against, during the voyage insured, is the cause of the loss of the earning the chartered freight by that ship. Loss of freight by reason of such damage to the ship caused by such a peril is a loss against which, according to the interpretation put upon the policy at the commencement of this opinion, the underwriter on this policy on freight has, in terms, agreed to indemnify the assured. The question, therefore, is whether the ship could have been sufficiently repaired to enable the assured to earn the chartered freight. Physically or mechanically it could. But as a matter of business, carried on according to the dictates of sense, it could not. The true meaning of the 24th paragraph of the case is that a prudent owner of this ship, that is to say an owner conducting himself according to the dictates of common sense in business, would not repair the ship. In such case the law holds that within the meaning of such a policy as this the ship could not be repaired so as to earn the freight or any part of it by the use of that ship. The assured not being able to tender that ship, and having none of the goods in his possession, had no claim to carry any goods under the charter-party in a substituted ship.

“ Without, therefore, relying upon the other impediment and prevention obviously in the way of the plaintiff earning the charter-party freight, namely, the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned show conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril, happening during the voyage insured ; and that such loss of freight is upon the construction put upon the policy at the commencement of this opinion, a loss by a peril insured against ; and that, inasmuch as without repairing the ship, which the assured did not do, and was not bound to do, because in consideration of law it could not be done, no part of the chartered freight could be earned by any one ; and that there was therefore no part of the chartered freight, or any chance of earning any part of it, which by a pretended abandonment could pass to or be of value to the underwriter on freight, and that consequently the loss of freight was an actual total loss without notice of abandonment.

“ If notice of abandonment had been necessary, the question

whether in this case it was given in due time seems to me to be more doubtful."

(After consideration of the facts, and the time when the assured received the information necessary to enable him to make his election, the judgment proceeds.)

(At page 106) "I therefore come to the conclusion, though with some doubt, that there was no information before the arrival of the surveys made at Calcutta, which made it incumbent on the assured to give notice of abandonment assuming notice at some time to be necessary, and that upon the same assumption the notice given upon the receipt of the Calcutta surveys was given in due time. . . .

"I therefore answer your Lordship's questions thus: As to the first, there was a loss by perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary it was given in time. As to the fourth, that in the case supposed, want of due notice as to the ship would not affect the rights of the plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the respondents."

BLACKBURN J. (at page 113): "My Lords, your Lordships have in this case proposed six questions to the judges, all of which I answer in favour of the plaintiffs in the cause, who are the respondents in your Lordships' House. With your Lordships' permission I will first state generally my reasons for deciding in favour of the plaintiffs on the merits." (Here follows a summary of the charter-party and policy.)

"It is to be observed on this charter-party that it is a condition precedent to the earning of the freight that the *Sir William Eyre* should be, in due time, at Calcutta, and there seaworthy for the voyage from Calcutta to London or Liverpool. The plaintiffs could not substitute any other vessel for it, and that being so, the plaintiffs might be prevented from earning that freight by any disaster which befel this particular ship on its voyage out to New Zealand, or during its stay there, or on the voyage thence to Calcutta, or during its stay there, if the effect of that disaster was to render it impracticable to tender the ship at Calcutta in due time and in a seaworthy condition for the voyage home round the Cape of Good Hope, but that they had a vested expectation of earning this freight if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed. . . . In the judgment in the Common Pleas in this case it is said: 'The policy under consideration thus differs from an ordinary insurance on freight. First, in that it could not be affected by loss of cargo because the freight insured was not for cargo in existence or appropriated during the risk; next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage insured, and, as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average. And, lastly, that as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters on ship, but would simply come to nothing upon such abandonment if justifiable, because the abandonment would be in effect an election by the owner to treat the charter as at an

end by reason of the usual exception of sea perils in the charter-party, and he would not be bound to incur in favour of the underwriters on ship any new responsibility not connected with the voyage on which the ship was insured.' So far I completely agree, and, instead of repeating this in other words, I adopt this language as my own, but in what follows in that judgment I do not agree.

"I think that if there was damage to ship such that though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss v. Smith* [1845], it was unreasonable so to do; the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if, under such circumstances, the owner did not in fact repair, the freight was totally lost by the perils insured against, and not, as stated in the judgment in the Common Pleas, by the owners' default, for the owner was not bound to repair the ship. There would be no loss from the perils insured against, if the owner did in fact repair the ship, which, though not bound to do so, he had a perfect right to do if he pleased.

"If, indeed, there had been a partial loss or damage such that the owner could reasonably repair the ship, he was bound to do so; and if in such a case he declined to do so, I should agree with the judgment in the Common Pleas in saying that he would lose the freight by his own choice or default, and not by any peril insured against. But I think that where the damage is so great that the owner is not bound to repair the ship, if he declines to do so he would lose his freight, not by his own default, but by the perils insured against. This seems an elementary proposition, but as much of what I consider the error in the judgment of the Common Pleas arises from not bearing it in mind, I will proceed to state some authorities for it." (The judge then referred to the case of *Stringer v. English, etc., Insurance Co.*, 1869, respecting means the assured could reasonably be expected to use to have prevented the loss.)

"... I must here observe that in my opinion (which in this respect differs from that expressed in the judgment in the Court of Common Pleas) there might well be a state of things in which the assured could recover on this policy for a total loss of the freight, though the assured could not either with or without notice of abandonment recover against the underwriters on ship for a total loss. The questions between the assured and the two sets of underwriters are not the same. The question between the assured and the underwriters on the ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth. The question between the assured and the underwriter on chartered freight is whether the damage can be so far repaired that the ship can be at Calcutta seaworthy for a voyage round the Cape of Good Hope without expending on it more than it would be worth. I should have added a further term that the repairs could be done so promptly that the ship might arrive at Calcutta within a reasonable time, as between the shipowner and De Mattos, were it not for the case of *Hurst v. Usborne* [1856] which seems to me an authority against this position. And though I should not hesitate to advise your Lordships to reconsider that case if necessary, I think it is not necessary to do so in the present case.

"My position is, therefore, that if the ship had been so damaged that it could be brought to Calcutta, and there made seaworthy for

a voyage round the Cape, but not without expending say £10,000, and would then, all things considered, be worth only £9000, but that it could by an expenditure of £4000 be made a ship quite fit for short voyages, though not for such a voyage as that round the Cape, and would then be worth £5000, there would be a total loss of the freight, though no total loss of the ship. No notice of abandonment whatever given to the underwriters on ship could have converted that which on those figures was only a partial loss into a total loss. This was decided by the Exchequer Chamber in *Kemp v. Halliday* [1865], a case which was not cited at your Lordships' Bar. . . .

"I now proceed to answer your Lordships' first question. That, in my opinion, depends upon a question of fact, which I think is answered by the important addition to the case made during the argument in the Exchequer Chamber, and now contained in the case [24th paragraph]. This can only mean that the damage was so great that the ship could not be repaired without spending more than its worth, and consequently that the shipowner might justifiably elect not to repair.

"I think that under such circumstances the shipowner had a right as against his underwriters on ship to come upon them for a total loss. But, if he does, then on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does, by taking satisfaction from the person indemnifying him, cede all his right in respect of that for which he obtains indemnity. It was held, in *Mason v. Sainsbury* [about 1785], that the Hand-in-Hand Insurance Company, having paid the plaintiff for a loss under a fire policy, was entitled to recover in an action in his name against the Hundred. This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word 'abandonment' often leads to confounding the two. There is no notice of abandonment in cases of fire insurance, but the salvage is transferred on the principle of equity expressed by Lord Hardwicke in *Randall v. Cockran* [1748] that 'the person who originally sustains the loss was the owner, but, after satisfaction made to him, the insurer.' . . .

"When, therefore, the party indemnified has a right to indemnify, and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify; and, therefore, if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from further deterioration, such steps, from the moment of the election, concern the party indemnifying, who therefore ought to be informed promptly of the election to come upon him, in order that he may, if he pleases, take steps for his own protection. And on general principles of law (still not confined to marine insurance) an election once determined is determined for ever, and such a determination is made by any act that shows it to be made. And, therefore, anything that indicates that the party indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for a partial loss, will determine his election so to do.

"In cases of marine insurance, the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity is by giving notice of abandonment, which is a very different thing from the abandonment or cession

itself. This notice when given is conclusive, that the assured, if still in a situation to determine his election, has determined to come upon the underwriters for a total loss, the consequence of which is that everything is ceded (to avoid the use of the ambiguous word 'abandoned') to the underwriters. . . . If before giving this notice the assured have already indicated by their acts, or if the circumstances are such that they indicate by their silence, that they have elected to adhere to the adventure as their own, the notice of abandonment obviously comes too late. A very good example of such a case is afforded by *Mitchell v. Ede* [1840], as explained in *Roux v. Salvador* [1836].” (After referring to *Stringer v. English, etc., Ins. Co.* [1869], where Phillips on Insurance is quoted, and also to *Knight v. Faith* [1850], the judgment proceeds:—)

(At page 121) “In the meanwhile I proceed to say that I should be very sorry to throw any doubt on the principle expressed by Lord Abinger in the following passage in his judgment in *Roux v. Salvador*, where, after stating the state of circumstances which give the insured a right to treat the case as one of total loss, he proceeds: ‘But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of indemnity requires that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value.’

“But I think this is from the nature of things confined to cases where there are some steps which the underwriters could take, if they had notice. When they can do so, I think that the neglect to give notice of abandonment may determine the owners' election. This is a matter that is now of much greater practical importance than it was when Lord Abinger delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances a notice of abandonment was often a very idle ceremony, and, in my opinion, unnecessary, if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally on what steps the underwriters might take if they had notice. If there was nothing they could do, no notice I think is required. This I apprehend is the principle *Cambridge v. Anderdon* [1824], *Roux v. Salvador* [1836], and *Farnworth v. Hyde* [1866]. For, as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as showing that there is no longer anything which can be done to save the thing, sold for whom it may concern. It conclusively determines that neither assurers nor assured can do anything, and consequently that a notice of abandonment would be but an idle form on which nothing could be done, and which therefore is unnecessary.

“If these which I have submitted to your Lordships are the true principles on which the law depends, it seems to me to be obvious that in this case there was a total loss of the freight in consequence

of the damage by sea perils being so great that the shipowner was not bound to repair the ship. No doubt the shipowner might have repaired it if he pleased, and if, as in *Benson v. Chapman* [1849], he had elected to repair it, and had done so, though at a ruinous expense, the freight would not have been lost. But the ship in this case never was repaired so as to make it capable of earning the freight, and the insured was under no obligation to make the repairs at ruinous cost.

"This brings me to the second question. I cannot see how the contract between the plaintiff and the defendant, by which the latter undertakes to indemnify the former against the loss of freight, can be in any way affected by the fact that the plaintiff had made a contract with other persons by which they undertook to indemnify him against loss on the ship. If the facts are not such as to amount to a loss of freight from the perils insured against, no transaction between the plaintiff and third persons could make them amount to such a loss. If they were such as to amount to a loss of the freight, it can make no difference to the now defendant whether the plaintiff can or cannot recover for the damage to his ship from other persons. It is true that a transaction with third persons may, as evidence, prove that the plaintiff had elected not to repair the ship as the sale of the wreck in *Cambridge v. Anderson* and in *Farnworth v. Hyde* did. And so, if the plaintiff in the present case had given notice of abandonment at once to the underwriters on ship, and recovered from them as for a total loss, it would have afforded conclusive evidence that he had elected not to repair the ship. . . .

"This brings me to consider whether it was necessary for the plaintiffs to give notice of abandonment to the underwriters on freight. . . . At present I will assume that the true principle is that notice of abandonment is only requisite when, from the state of facts, it may make a difference to the underwriters, if the assured delays making his election whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss. If that be the principle, it seems to me to follow from it that, inasmuch as there was nothing which the underwriters on freight could have done to alter their position in consequence of a notice of abandonment, and that it would have been an idle ceremony, no notice could ever be required, and, not being required at all, could not be too late. These are the reasons for which I answer your Lordships' second question by saying that in my opinion no notice of abandonment either of ship or freight was necessary to enable the plaintiffs to recover for a total loss on the policy on freight.

"To the third question, that in my opinion no notice at all being required, it never could be out of time.

"To the fourth question, that though I think that under the circumstances of this case the plaintiffs have precluded themselves from recovering for a total loss of the ship, that in no way affects the rights of the plaintiffs upon the policy on freight.

"I now come to your Lordships' fifth question. . . . I have already indicated that I think that the assured so conducted themselves as to discharge the underwriters on ship from the liability for a total loss, for the assured took to themselves the chance of benefit from retaining the ship as their own, and so made their election as to the ship. But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through. It was indeed suggested that the underwriters on

freight might have made some arrangements with the underwriters on ship, by which they were to repair the ship, send her on, and in the name of the owners tender her to De Mattos. But in all cases, and especially in cases of insurance, we must look to what is practically possible, and not to remote theoretical imaginations. If it could be shown that the delay in this case, which was certainly considerable, had in any way altered the position of the underwriters, if there was anything which they could have done, if the claim had been made on them when the disaster happened at New Zealand, or in the interval which they cannot now do, or if any prejudice had been sustained by them in consequence of the delay, the case would have been different, I should then have to consider whether the prejudice sustained was sufficient to give rise to a preclusion. But as the facts are, there is nothing of the sort. I therefore answer your Lordships' fifth question by saying that in my opinion there was no such conduct as to discharge the underwriters from their liability upon the policy on freight.

"The answers to those five questions would answer the sixth and last, were it not that I reserved to this time the discussion of the proposition argued at your Lordships' Bar, that there is a technical necessity for a notice of abandonment in a case of marine insurance, whether any use can be made of it or not, and whether the failure to give it works any prejudice or not. It was said it was required by the law merchant as to insurance just as notice of dishonour is required by the law merchant on a bill of exchange.

"Such is the law in some foreign countries, but I will submit to your Lordships my reasons for thinking that it is not and never was the Law of England."

(The judge then referred to the following authorities respecting abandonment:

Emerigon, *Treatise on Insurance*, chapter xvii., citing Casaregis' three rules as stating the law merchant on the subject;

Ordonnance de la Marine, 1681, Article 46;

Supplemental Ordonnance of 1779;

Hamilton v. Mendes, 1761;

Dean v. Hornby, 1854;

Roux v. Salvador, 1836;

Phillips' *Treatise on Insurance*, chapter xvii.;

Knight v. Faith, 1850;

Fleming v. Smith, 1848;

Stewart v. Greenock Mar. Ins. Co., 1848;

and continued :)

(At page 131) "But I cannot see how, or in what way, the assertion of the doctrine that recovering for a total loss operates as a cession of everything, can be said to amount to the assertion of that other doctrine that the handing in of a notice of abandonment is a condition precedent to the right to claim for a total loss. And as it seems to me every dictum cited in *Knight v. Faith* is capable of being reconciled with the judgment in the Exchequer Chamber in *Roux v. Salvador*, if it is only borne in mind that the abandonment or cession consequent on recovering for a total loss is one thing, the notice of abandonment supposed to be a condition precedent to claiming for a total loss is another. I have dwelt on this point at perhaps unnecessary length, for all that is necessary to decide in this case is that where there is nothing to abandon no notice is requisite.

"I have therefore to conclude by saying in answer to your Lord-

ships' last question that in my opinion judgment ought to be for the plaintiffs in the cause, the respondents in your Lordships' House."

Mellor J., Bramwell B., and Lords Chelmsford, Colonsay, and Hatherley delivered judgments to the same effect.

Martin B. delivered judgment in favour of the appellants.

ROBINSON GOLD-MINING COMPANY *v.* ALLIANCE
INSURANCE COMPANY (1904)

APPEAL CASES, page 359, HOUSE OF LORDS.

"Seizure" in the F.C. and S. clause explained.

Gold, the property of a Company registered under the laws of the South African Republic, was insured against "arrests, restraints, and detainments of all kings, princes, and people," during transit from the mines to the United Kingdom, subject to a warranty "free of capture, seizure, and detention, whether before or after declaration of war." During transit the gold was taken possession of by the Government of the Republic on its own territory in anticipation of war with Great Britain, and in accordance with the laws of the Republic, and was afterwards appropriated by the Government:

Held, that there was a "seizure" of the gold within the meaning of the warranty, and that the insurers were not liable on the policy.

In October 1899, gold of the value of £211,000 belonging to the appellants was sent by rail from Johannesburg to Capetown *en route* for London, and was removed from the train in the territory of the South African Republic by a Government official who had received a telegram from the State Attorney at Pretoria, ordering him to take the gold into safe custody. The Government of the Republic was in this matter (as found by Phillimore J.) acting according to the laws of the Republic in view of the impending war, which broke out a few days later.

The appellants having brought an action on the policy against the insurers, Phillimore J. gave judgment for the respondents, and this decision was affirmed by the Court of Appeal.

EARL OF HALSBURY L.C. (at page 361): "My Lords, . . . I confess I cannot entertain the least doubt in the world that the language here is used in its plain and natural sense, and if it is construed in its plain and natural sense I think the judgment of the Court of Appeal is absolutely right.

"What can be the value of an argument upon some technicality or some narrow construction of the whole contract between the parties, where the truth is that the word 'seizure' is intended to be used in a general sense? This gold was seized, taken away, and ultimately used by the Government of the South African Republic. It was taken—I do not care whether they had authority according to their law or not,—as a matter of fact it was taken, and that was one of the things excluded from the losses insured against. The bargain between the parties put in plain terms is, 'I, the underwriter, will not be responsible if this gold is taken away and seized by any authority whatsoever.' That is the plain meaning of the bargain. Why am I to put any narrow or technical construction upon these words? That is the bargain which the parties have agreed to. I decline to go into the ingenious argument which has raised every kind of supposed distinction that could apply to such a case when to my mind these words are absolutely plain. The

words seem to me to take out of the perils insured against the particular thing that has happened. I decline to go into it further than this—that this gold was seized.

"Subtle distinctions have been raised by Mr. Hamilton, but it seems to me that he wants to divide a plain transaction into two different sets of proceedings, so that the first stoppage, detention or seizure (whatever word is used), was not intended to be an absolute seizure, but only to keep the gold in safe custody. I think the Transvaal Government intended to appropriate the gold from the first; but whether that was their intention or not they seized it, and took care that it should be within their power and control if they thought proper to use it.

"Under these circumstances it seems to me that the terms of the warranty clearly apply; and that being so, I decline to go into this very long series of authorities, or into those ingenious subtleties which have been put before us.

"My Lords, it appears to me to be a very plain case, and I move your Lordships that this appeal be dismissed with costs."

Lords Macnaghten, James, and Lindley were of the same opinion.

RODDICK *v.* INDEMNITY MUTUAL MARINE
INSURANCE COMPANY (1895)

QUEEN'S BENCH DIVISION, vol. ii., COURT OF APPEAL, page 380.

The plaintiff effected a time policy with the defendants for £1000 on the "hull and machinery" of a steamship which were valued at £10,000. The policy contained a proviso, "£5000 warranted uninsured." The policies effected by the plaintiff on the hull and machinery were for sums amounting in the whole to £5000. He had, however, by means of honour policies effected further insurances to the extent of £2600 upon "disbursements." The ship was lost within the insured period, and the defendants disputed their liability on the ground that the honour policies constituted a breach of the warranty:

Held, affirming the decision of Kennedy J. (1895, 1 Q.B. 836) that the honour policies did not cover any part of the subject-matter of the policy on "hull and machinery," and were therefore not a breach of the warranty. The plaintiff stated that he intended in effecting the "honour" policies for £2600 to cover certain disbursements amounting to £2583 for coals, etc., in respect of the vessel proceeding to the coast of South America, and trading there as warranted by him in the policy, viz.:

About £147 expended on coal.

£318 expended on engine-room and cabin stores.

£462 expended on provisions and cabin stores.

£191 expended on port expenses at Newport and advances.

£395 expended on premiums.

The plaintiff called two witnesses, an underwriter and an insurance broker, and their evidence, in the opinion of the learned judge, came to this: that an insurance on "hull," according to the well-known practice of underwriters, would in a "voyage policy" include such equipment or outfit (in the case of steamship), in the shape of bunker coal and ordinary deck and engine-room stores, as would be necessary for the voyage described in the policy. The learned judge held first

that this evidence was not inferentially applicable to the case of a time policy, that the honour policies on disbursements could not be disregarded in reference to the warranty of " £5000 uninsured " on account of their legal invalidity ; and that, if the disbursements were covered by the defendants' policy, there had been a breach of the warranty ; secondly, that the " disbursements " were not covered by the policy on " hull and machinery," and that consequently there had been no breach of the warranty, and the plaintiff was entitled to recover. The defendants appealed.

LORD ESHER M.R. (at page 383) : " Different forms of policy have been adopted by different insurance companies. Originally a ship was not insured by the word " ship " alone ; but some insurance companies have adopted that form of policy, and the Courts have had to determine what is the meaning of the word " ship " in a policy insuring against perils of the sea. To hold that the word included only the hull of the ship would have been absurd, and the Courts have accordingly held that the word included something more than the hull—how much more it is not necessary to say now. There is, as it seems to me, clear authority for holding that the word " ship " does not include the provisions which are taken on board ; but it is not necessary to decide that now. The defendant company have departed from the use of the word " ship," and have used instead of it another term—" hull and machinery," and we have to construe those words. The " hull " of a ship is a well-known nautical term. If you were to tell a sailor that the hull of his ship included the provisions on board, he would be very much surprised ; and so he would if he were told that the provisions were part of the " machinery " of the ship. Taking the words " hull and machinery " in their ordinary natural sense, it is perfectly clear what they mean. Has it then been proved that these words have, as between assurer and assured, universally acquired a meaning different from their natural meaning ? In my opinion the learned judge was quite right in holding that this had not been proved. I am satisfied that the words " hull and machinery " cannot be taken as including those things which are covered by the " disbursement " policies. It follows that the defence of breach of warranty cannot be maintained, and the learned judge was right in so holding. This being my view of the evidence, it becomes unnecessary to deal with the other point which has been decided by Kennedy J., namely, that an honour policy which is null and void in law can nevertheless be taken into account as a breach of a warranty that a ship is uninsured to a specified amount. But it must not be assumed that I assent to the views of the learned judge on this point."

Kay and A. L. Smith L.JJ. delivered judgments to the same effect.

RODOCANACHI *v.* ELLIOT (1874)

L.R. 9, C.P. 518. IN THE EXCHEQUER CHAMBER.

Constructive total loss of goods by restraint of kings, princes, and people.

In a policy of insurance on goods the voyage was described : " At and from Japan and/or Shanghai to Marseilles and/or Leghorn and/or London *via* Marseilles and/or Southampton, including all risks of craft to and from the steamers," etc. The risks insured

against were, amongst others, of the seas, fire, and thieves, arrests, restraints, and detainments of all kings, princes, and people, etc. In the margin of the policy was the following memorandum : " It is hereby agreed that the silks insured by this policy shall be shipped by Peninsular and Oriental Company, Messageries Impériales steamers, and the steamers of the Mercantile Trading Co. of Liverpool only." The goods insured were shipped from Shanghai for London by the Messageries Impériales ; the practice of that Company was to send such goods overland through France by the Lyons Railway from Marseilles to Paris, and thence by the Northern Railway to Boulogne and thence to London ; and this course of business was well known among underwriters.

The goods in question arrived in Paris on their way on the 13th September 1870. At this time the German armies were advancing on Paris, and had seized parts of the Northern Railway, so that the goods could not be forwarded to Boulogne, and on the 19th September they completely surrounded and besieged Paris, preventing communication between it and all other places, by reason of which it was impossible to remove the goods from Paris. This state of things continued till after the 7th October, on which day the assured gave notice of abandonment :

Held, affirming the decision of the Court below, that the policy covered the overland transit from Marseilles to Boulogne ; and that there was a constructive total loss by restraint or detainment of princes within the meaning of the policy.

The judgment of the Court (Bramwell and Piggott BB., Quain and Archibald JJ., and Amphlett B.) was delivered by BRAMWELL B. (at page 520) : " The first point made by the defendant . . . was that, supposing there was a loss within the policy, there was no right of abandonment, the plaintiffs having sold the goods. The answer is, that if the plaintiffs had the right of abandonment and did abandon, the abandonees, the underwriters, thereby acquired all the rights of the assured, including their right to the price of the goods from the vendees.

" The second point made by the defendant was that the policy was limited to marine risks. What was in the contemplation of the parties does not matter, though we do not doubt that the assured must have had the whole journey in view. We must see what the policy says. It seems to us that it very clearly, in words, includes the whole transit by land as well as by sea. The words are : ' At and from Shanghai to Marseilles and London via Marseilles.' . . . Bearing in mind the course of carriage and transit found in the case, there can be no doubt the voyage or journey described includes a land passage through France. . . . We see nothing to make us limit the plain words of the policy to the sea part of the transit."

(His Lordship then recited the facts of the silks arriving in Paris, the state of affairs there, and their detention there, and proceeded :)

(At page 522) " The result of this state of things undoubtedly was that the goods were prevented from leaving Paris, and the whole adventure was broken up, and so continued at the time when the notice of abandonment was given, and up to the commencement of the action. We are of opinion that this amounts to a constructive total loss of the goods, by restraint of kings and princes within the terms of the policy. This is not a mere temporary retardation of the voyage, but a breaking up of the whole adventure. It is well established that there may be a loss of the goods by a loss of the

voyage in which the goods are being transported, if it amounts, to use the words of Lord Ellenborough, 'to a destruction of the contemplated adventure,' *Anderson v. Wallis* [1813]; *Barker v. Blakes* [1808].

"But it is said that there has been no loss of the goods by restraint of kings and princes in this case, because there has been no specific action on the goods themselves. It is true that there was no actual seizure or arrest of the goods, nor was there any specific or published order prohibiting the transport of goods from the besieged city; but the city in which the goods were, was besieged and completely invested; all commerce was stopped, and the goods were as effectually prevented from coming out as if they were actually seized by the German army.

"What we have to look at is whether by the immediate and direct pressure of the German army the goods were prevented from reaching their destination."

(At page 523) "If, therefore, the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence, we think that the goods in this case were restrained or prevented from leaving Paris by the operation of that siege. It appears to us that the words 'restraints and detainments of all kings and princes, and people of what nation, condition or quality soever' are wider and more comprehensive words than those which precede them, and that they include and cover the case now under consideration. . . . We think, therefore, that the judgment of the Court below ought to be affirmed."

ROUX *v.* SALVADOR (1836)

BINGHAM'S NEW CASES, vol. iii. page 266. IN THE EXCHEQUER CHAMBER.

Sea damage—Sale at intermediate point—Total loss.

Hides insured from Valparaiso to Bordeaux, free of particular average unless the ship were stranded, arrived at Rio de Janeiro on their way to Bordeaux in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rio because, by the process of putrefaction which could not be stopped by any practical means at Rio, they would have been destroyed before they could have arrived at Bordeaux. The news of the damage to the hides and their sale in consequence was received by the assured at the same time:

Held, that the assured might recover as for a total loss, without abandonment.

LORD ABINGER C.B. (at page 277): "It appears from the report of the judgment of the Court of Common Pleas upon this case that the learned judges were of opinion there was a constructive total loss, in case it had been followed by an abandonment to the underwriters; and that their judgment for the defendant was grounded upon the want of such abandonment. . . ."

(At page 278) "The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the seas from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from

the vessel ; whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, *in specie*, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed, or can have the control of them, if they still have an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case the loss can but be a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But, if the goods once damaged by perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel ; if it be certain that before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character ; if though imperishable, they are in the hands of strangers not under the control of the assured ; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination ; in any of these cases, the circumstance of their existing *in specie* at that forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods whether his inability arises from their annihilation, or from any other insuperable obstacle."

(At page 281) "In the case before us the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction, which had commenced, a total destruction of them before their arrival at the port of destination became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold ; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us therefore that this was not the case of what has been called a constructive loss, but an absolute total loss of the goods ; they could never arrive ; and at the same moment when the intelligence of the loss arrived, all speculation was at an end. It has indeed been strenuously contended before us that the sale of the hides whilst they remained *in specie* rendered abandonment necessary to make the loss total ; that the money produced at the sale became vested in the assured ; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial ; and that, wherever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not ; but his abstaining from his right does not alter the nature of it ; and if it be true that the proceeds of the sale vested in him, they would equally have done so if, instead of being sold *in specie*, the hides had actually changed their form, and been sold as glue, or manure, or

ashes. The argument, therefore, in effect resolves itself into this question whether, when a total loss has taken place before the termination of the risk insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss."

(His Lordship then went into the history of abandonment both in our own law and in foreign codes, and proceeded:)

(At page 285) "It is indeed satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages that the object of the assurance shall arrive safely at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases—there may be a capture, which though *prima facie* a total loss may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged that they may not be worth the expense of bringing them, or what remains of them, to their destination. In all these, or any similar cases, if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elect to do this, as the thing insured or a portion of it still exists and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value. In all these cases not only the thing assured, or part of it, is supposed to exist *in specie*, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before."

His Lordship after dealing with the decisions in some English cases, particularly *Cambridge v. Anderton*, 1824, and *Mitchell v. Ede*,

1840, reversed the judgment of the Court of Common Pleas, and gave judgment for the plaintiff.

“RUABON” S.S. CO. v. LONDON ASSURANCE (1900)

APPEAL CASES, page 6, HOUSE OF LORDS.

Dry dock expenses—There is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit from it.

During a voyage covered by a policy of marine insurance a vessel was damaged by a peril insured against, and was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners (without causing delay or increase in dock expense) took advantage of her being in dry dock to have the survey made, and her classification was renewed:

Held, that the expenses of getting the vessel into and out of dry dock, as well as those incurred in dry dock, fell upon the underwriters alone, and could not be apportioned between them and the owners.

The *Vancouver* case (*Marine Ins. Co. v. China Trans-Pacific S. Co.*, 1886) distinguished.

The *Ruabon*, belonging to the appellants and insured with various underwriters, including the respondents, while on a voyage suffered damage, for which the underwriters were liable. She was taken into dry dock in Cardiff for the purpose of having the necessary average repairs effected. While she was in dry dock the appellants took advantage of the opportunity to have her surveyed by Lloyd's surveyor. About nine months had still to run before a survey was necessary in order that she might retain her classification, but by Lloyd's rules the owner was entitled to call for a survey at the time it was made. The surveyor certified that no classification repairs were necessary, and she retained her classification. An average statement was prepared showing that the total amount due from the underwriters in respect of the repairs was £822 : 14 : 10, of which the amount due from the respondents was £82 : 5s. The respondents contended that the expenses of taking the ship into dock and taking her out again, as well as those incurred in the use of the dock, ought to be divided between the underwriters and the owners, and claimed to deduct £2 : 5s. on this account. The appellants brought an action against the respondents for the disputed £2 : 5s. The action was tried before Mathew J. without a jury upon mutual admissions that Lloyd's survey was made as above stated, that docking was necessary for the vessel to pass Lloyd's survey, that items amounting to £55 were necessarily incurred in connection with the docking, but that she did not go into dock for the purpose of Lloyd's survey, that no classification repairs were necessary, and that the time had not arrived at which it was necessary for her to pass Lloyd's survey.

MATHEW J. gave judgment for the defendants on the authority of the *Vancouver* case, and this decision was affirmed by the Court of Appeal (Chitty and Collins L.J.J.; A. L. Smith L.J. dissenting). The defendants brought the present appeal to the House of Lords.

EARL OF HALSBURY L.C. (at page 9): “. . . The agreed facts may be very shortly stated. The steamship *Ruabon* having been placed in dock for the purpose of repairs, for which the underwriters

were liable, while she was in dock the owner took advantage of the opportunity to have the vessel surveyed. It is part of the agreed facts that the holding of the survey added not a farthing to the cost or a moment to the period of time during which the execution of the repairs proceeded, and the question is raised whether the owner of the vessel is responsible, on any reason known to the law, to bear part of the expense involved in the docking of the vessel and keeping her there while the repairs were being executed.

"My Lords, I notice in more than one of the judgments it is said that the owner of the vessel used the dock for his own purposes. I think there is a fallacy in the employment of that word 'used.' He went on to his own vessel, and held a survey, and I think it is not true to say that the dock was used for his purposes at all. He took advantage of the opportunity which was afforded him by other persons (the insuring company) being under contract to do that themselves which gave him an opportunity of seeing the vessel, and which, if he had been minded to make a survey, he would have had to pay for himself. But unless the phrase 'using of the dock' is explained, it seems to me to be fallacious, first to say that he used the dock, and then to infer that as he used the dock he is called upon to pay for it.

"My Lords, I propose to examine in detail the various cases, or rather the various classes of cases, where the right to contribution has been held to be part of our law. But it seems to me a very formidable proposition indeed to say that any Court has a right to enforce what may seem to them to be just, apart from common law or statute. The Courts, no doubt, will enforce the common law, and will apply it to new questions of fact which arise; but I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it. Many cases might be put where the generality of such a proposition would be plainly contrary to any received principle, and to my mind the question now in debate—admitted to be absolutely novel—would not be covered by any principle known to the law, except such a general proposition as I have indicated above.

"Now I am unable to affirm that that is the condition of the common law. The doctrine of average has been repeatedly held to be a rule derived from the maritime law of Rhodes."

(His Lordship then referred to the following authorities respecting contribution :

Lord Watson in *Strang v. Scott*, 1889;
 Lord Bramwell in *Wright v. Marwood*, 1881;
 Lord Esher in *Burton v. English*, 1883;
 Lord Coke in Sir William Harbert's case, 1584;
 Lord Redesdale in *Sirling v. Forrester*, 1821;

and continued:)

(At page 11) "My Lords, I know of no case in which anything like the present claim has been advanced. There is no debt here for which both the parties are bound to some third person.

"It cannot be denied that the underwriters here were themselves bound to incur all the liability they did incur, and that the shipowner was under no such liability. There is here no joint ownership which makes a liability upon all partaking of that ownership, and which

liability each is under an obligation to some third person to fulfil."

(After a further reference to the dictum of Lord Redesdale his Lordship proceeded:—)

(At page 12) "My Lords, in all the cases that I have referred to, and in all the observations made by the learned judges, the liability of each of the persons held to be bound to contribute is assumed to exist either by contract or by some obligation binding them all, to equality of payment or sacrifice in respect of that common obligation. But this is the first time in which it has been sought to advance that principle where there is nothing in common between the two persons except that one person has taken advantage of something that another person has done, there being no contract between them, there being no obligation by which each of them is bound, and the duty to contribute is alleged to arise only on some general principle of justice that a man ought not to get an advantage unless he pays for it. . . .

"My Lords, I can find no authority for any principle which includes this case. . . . This case seems to me to go entirely beyond those ascertained principles, and to an extent for which it would appear there is no authority. No statute has authorized, no principle of the common law comprehends it; and I am therefore unable to concur with the judgment of the majority of the Court of Appeal.

"But it remains to consider whether the case is not covered by authority. That supposed authority is to be found in what has been called the *Vancouver* case—the *Marine Ins. Co. v. China Trans-Pacific Co.* My Lords, I cannot think that that case establishes any such proposition as is insisted on here. In that case the sole question was whether a particular average loss sustained by the respondent exceeded 3 per cent within the meaning of the warranty.

"It is necessary to observe somewhat minutely the facts of that case, in order to see whether there is anything in it which affects the question now in debate. The *Vancouver*, the vessel in question, was insured in a time policy, which contained the warranty 'free from average under 3 per cent.' During a voyage covered by the policy she sustained certain damage not known at the time, but when, some time after, the owners, for their own purposes of cleaning and scraping her, put her into dock, the damage was observed then and there, and the underwriters were of course liable to make good the particular average loss for which under the policy they were liable.

"The question having arisen in this form, and the owners having paid the whole of the dock dues while the vessel was being scraped and cleaned, and while simultaneously the obligation of the underwriters was being fulfilled by the repair of the damage, it was argued that the accidental circumstances of the owner having put his vessel into dock, and the underwriters having thereby escaped any liability to the dock owner for dock dues, the cost of repairs to him was thereby brought under the agreed amount of 3 per cent.

"What the Court had to determine was the liability under the policy in question, and with reference to that question which, be it observed, is to be measured by what the damage would cost to repair, the Court held that the dock dues were part of the cost, and that under the circumstances, as the operations were simultaneously performed, the cost should be attributed (let the phrases be noted) in moieties to the operations of those two persons interested. Now

the owner paid the dock dues, and, if he had not done so, the underwriter would undoubtedly have had to pay for dock dues, and if he had, the amount would have been over 3 per cent. It came, in fact, to a calculation of the extent of the damage done, and, that being measured by its cost of repair, it was held that the 3 per cent was reached. What Lord Herschell meant is, I think, sufficiently explained by what he says in commenting on the case of *Pitman v. Universal Mar. Ins. Co.* as to the mode in which the particular average loss was to be arrived at in that case. He says 'all the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, he is entitled, as a general rule, to recover the sum properly expended in exceeding the necessary repairs, less the usual allowances.'

"Now the facts found in that case relied on were that the vessel was put into dry dock on 4th January 1876. It was discovered on the afternoon of the same day that her stern-post was broken. It was found by the special case that if the vessel had required nothing but scraping and cleaning, the purposes for which alone she was put there by her owners, she might have been finished and discharged by the evening of the 6th, whereas for the purposes of her repair, for which the underwriters were responsible, she required the whole time from the 4th to the 11th of January, when, in fact, she was discharged.

"My Lords, how a mode of thus calculating the particular average loss so as to satisfy the contract between the two parties to it can justify such a proposition as is here insisted on, I am wholly unable either to understand or agree to, and I think this judgment should be reversed, and I move your Lordships accordingly."

LORD BRAMPTON: "My Lords, I entirely concur in the judgment which has been delivered by the Lord Chancellor.

"I take the general rule to be correctly stated by Lord Herschell in the *Vancouver* case, that where there is a partial loss in consequence of injury to a vessel by perils insured against and the ship is actually repaired by the shipowner, he is entitled to recover the sum properly expended in executing the necessary repairs less the usual allowances, as the measure of his loss. . .

"Since the decision in the *Vancouver* case, by which, of course, we are bound, and which seems to me to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea—one of such operations being to effect repairs for the cost of which the underwriters are responsible—the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry docked, and both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry docking; in such cases the cost of docking and all dock dues must be shared in proportion, having regard to the period of joint or separate actual use of it.

"I do not, however, find anything in the *Vancouver* case which would justify such division of dock dues unless in such cases as I have mentioned. The present is a very different case. The *Ruabon* was

dry docked solely to enable the underwriters to effect the repairs for which they were liable, and with no other object, and no other repair, was, in fact, done or required to be done on the ship ; the survey of Lloyd's surveyor was in no way necessary for any purpose connected with the work performed on the vessel, but was only made to entitle the owners to reclassification at Lloyd's, and need not have been made at that moment, nor at any particular time, so long as it was made within the time limited by Lloyd's rules, which had then nine months to run. It is quite true that if it had not then been made it would have been necessary if she were afterwards surveyed to have incurred the expense of dry docking her at owners' expense ; and to that extent the owners might have been benefited. I say might, because the owners might have sold the vessel in the meantime, or some other thing might have occurred to render such survey unnecessary. Assuming, however, that the expense of another dry docking was in this way saved, and that to that extent the owners were benefited, I think that circumstance is immaterial, and does not warrant a claim for contribution towards the dock dues imperatively incurred on the underwriters' account in the discharge of their obligations. I think such contribution can only be insisted upon in those cases where work is done to the vessel itself, by two or more persons, each separately and simultaneously engaged under different obligations in doing portions of it, dry docking being necessary for each. If the respondents' claim was allowed, I see no reason why such a claim might not be made against an owner who, while his ship was in dry dock, sold her subject to immediate inspection and survey by his purchaser. A variety of other cases similar in character might be suggested. I think the owners, in causing the survey to be made in this case, were taking what Lord Herschell termed 'an incidental advantage, from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriter,' and he puts by way of illustration the case of a vessel in ordinary course requiring scraping and painting at intervals of five years, and before the time for such operation has arrived meeting with a disaster by perils of the sea, and docked for repairs for which the underwriters were responsible, and the shipowner taking the opportunity of scraping and painting his ship. In repudiating the notion that the entire expenses of the time occupied in that operation should be borne by the shipowner, he adds, 'if they were to be borne by him at all.' This observation of that noble and learned Lord makes it clear to me that he did not contemplate his judgment covering such a case as this, where nothing was in fact done on the ship, and the survey did not in the smallest degree delay the completion, or add one farthing to the expense of the repairs done for the underwriter. I think, therefore, that this appeal should be allowed."

Lords Macnaghten, Morris, Davey, and Robertson concurred.

SCARAMANGA *v.* STAMP (1880)

COMMON PLEAS, vol. v. page 295, C.A.

Deviation—When is it justifiable?

A deviation for the purpose of saving life is justifiable, but not a deviation for the mere purpose of saving property.

The defendants' ship was chartered by the plaintiff to carry a

cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress called the *Arion*, and the master, in consideration of £1000, agreed to tow her into the Texel, which was out of his usual course. Whilst doing so the defendants' vessel was stranded, and ultimately (with her cargo) was totally lost. The jury found that it was not reasonably necessary to take the *Arion* to the Texel in order to save the lives of those on board her; but it was reasonably necessary to do so in order to save her and her cargo:

Held, that the deviation was unjustifiable, and, consequently, that the plaintiffs were entitled to recover the value of the cargo against the defendants as owners of the ship.

COCKBURN C.J. (at page 298): ". . . The steamship *Olympias*, of which the defendants are owners, having been chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to Gibraltar, and having started on her voyage when nine days out sighted another steamship, the *Arion*, in distress, and on nearing her found that the machinery of the *Arion* had broken down, and that the vessel was in a helpless condition. The weather was fine and the sea smooth, and there would have been no difficulty in taking off and so saving the crew; but the master of the *Arion*, being desirous of saving his ship as well as the lives of his crew, agreed to pay £1000 to the master of the *Olympias* to tow the ship into the Texel.

"Having taken the *Arion* in tow, the *Olympias*, when off the Dutch coast, on the way to the Texel, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

"Under these circumstances the plaintiff claims the value of his goods, alleging that the goods were not lost by perils of the seas so as to be within the exception of the charter-party, but were lost through the wrongful deviation of the defendants' vessel. The defendants plead that the deviation was justified, because it was for the purpose of saving the *Arion* and her cargo, and the lives of her captain and crew, the ship being in such a damaged condition that she could not be navigated.

"That there was here a twofold deviation, which, unless the circumstances were such as to justify it, would entitle the plaintiff to recover, cannot be disputed—in the first place, in the departure of the *Olympias* from her proper course in going to the Texel, secondly, in her taking the *Arion* in tow, which in the three American cases of *Hermann v. Western Mar. and Fire Ins. Co., Natchez Ins. Co. v. Stanton*, and *Stewart v. Tennessee Mar. and Fire Ins. Co.*, has been held equivalent to a deviation, and rightly so, seeing that the effect of taking another vessel in tow is necessarily to retard the progress of the towing vessel, and thereby to prolong the risk of the voyage. It is unnecessary to consider how far, if the loss had not been the consequence of the deviation, the mere fact of the deviation would render the shipowner liable to the goods-owner for loss that ensued after it, as distinguished from its effect in a case of insurance; as there can be here no doubt that the loss not only occurred during the deviation, but was occasioned by it, there being the express admission of the master to that effect; and the case therefore comes within the ruling in *Davis v. Garrett* [1830], the authority of which so far as relates to a loss of goods occurring during the course of a deviation, has never been questioned. . . . As regards that part of the plea which seeks to justify the deviation on the ground of its having been for the purpose of saving the lives of the crew of the *Arion*, it is

obvious that the defence fails on the finding of the jury, who have found, and beyond question rightly, that the deviation was not reasonably necessary in order to save the lives of those on board. On the other hand, the jury have found that the deviation was reasonably necessary for the purpose of saving the *Arion* and her cargo. The question for decision therefore, is whether when deviation has taken place with the object, not of saving life, but of saving property alone, the shipowner will be exempt from liability to a goods-owner whose goods have been lost through the deviation. Mr. Justice Lindley, before whom the cause was heard, at *nisi prius*, gave judgment in favour of the goods-owner, the plaintiff, and the case comes before us on appeal from his decision."

(After reference to a number of English cases the judgment proceeds at page 303 :)

"The case before us presents itself therefore so far as our Courts are concerned, as one of the first impression, on which we have to declare, or perhaps, I may say, practically to make, the laws.

"I am glad to think that in doing so we have the advantage of the assistance afforded to us by the decision of the American Courts, and the opinions of American jurists, whom accident has caused to anticipate us on this question. And although the decisions of the American Courts are of course not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost respect and confidence on our part.

"It is, however, unnecessary to go through the American decisions in any detail. The effect of them is to be found in the well-known text-writers, but is nowhere better stated than in the judgment of Mr. Justice Sprague in the case of *Crocker v. Jackson*. The result of these authorities, immediately bearing on the question which we have here to decide, may be briefly stated.

"Deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods-owner in respect of loss which would otherwise be within the exception of 'perils of the seas.' And, as a necessary consequence of the foregoing, deviation for the purpose of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger of life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.

"If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.

"But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.

"In these propositions I entirely concur, as well as in the reasoning by which this view of the law is supported by Mr. Justice Lindley in his very able judgment.

(At page 305) "Deviation for the purpose of saving property stands obviously on a totally different footing. There is here no moral duty to fulfil, which, though its fulfilment may have been

attended with danger to life and property, remains unrewarded. There would be much force, no doubt, in the argument that it is to the common interest of merchants and insurers, as well as of ship-owners, that ships and cargoes when in danger of perishing, should be saved, and consequently that as a matter of policy, the same latitude should be allowed in respect of the saving of property as in respect of the saving of life, were it not that the law has provided another, and a very adequate motive for the saving of property, by securing to the salvor a liberal proportion of the property saved—a proportion in which not only the value of the property saved, but also the danger run by the salvor to life or property is taken into account, and in calculating which, if it be once settled that the insurance will not be protected, nor the merchant freed from liability in respect of loss of cargo, the risk thus run will, no doubt, be included as an element. It would obviously be most unjust if the shipowner could thus take the chance of highly remunerative gain at the risk and possible loss to the merchant or the insurer, neither of whom derives any benefit from the preservation of the property saved. This is strikingly exemplified in the present case, in which, not content with what would have been awarded to him by the proper Court on account of salvage, the master made his own terms, and would have been paid a very large sum had the attempt to bring the *Arion* into port proved successful. It is obviously one thing to accord a privilege to one who acts from a sense of duty, without expectation of reward, another to extend it to one who neither acts from a sense of moral duty nor in obedience to what may be thought to be the policy of the law, but solely with a view to his own individual profit.

"In the result, I am of opinion that though the deviation of the *Olympias*, so far as relates to her proceeding to the *Arion* in the first instance, was justified, the taking the latter in tow, and departing from the proper course in order to take the ship to the Texel, this not being necessary in order to save the lives of the captain and crew, was an unauthorized deviation ; and the loss of the plaintiff's cargo having been the direct consequence of the deviation, or, to use the language of Tindal C.J. in *Davis v. Garrett*, 'the loss having actually happened whilst the wrongful act was in operation and force, and being attributable to the wrongful act,' the defendants cannot avail themselves of the exception in the charter-party, and the plaintiff is therefore entitled to judgment. The appeal must therefore be disallowed.

"I am authorized by my colleagues, Lord Justice Brett and Lord Justice Cotton, to say that they concur in the judgment I have just delivered."

Lord Justice Bramwell delivered judgment to the same effect.

SCHLOSS BROS. *v.* STEVENS (1906)
KING'S BENCH DIVISION, vol. ii. page 665.
"All risks by land and water" interpreted.

By a policy of insurance in the printed form of an ordinary Lloyd's policy, with the addition of the following clauses in type or writing, goods were insured at and from "on board the import vessel at Savanilla and/or Cartagena to any place or places in the interior of the Republic of Colombia with liberty to proceed to any place or places in the interior irrespective of what may be stated in

the invoices and/or elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects and all clauses as attached." The attached clauses contained (*inter alia*) the following provisions: "Including . . . all risks by land and by water," and, "Including risk from the act of God, the king's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof," also, "Including all risks excepted by the negligence clause which may be inserted in or attached to charter-party and/or Bill of Lading."

During the transit between Savanilla, a port in the Republic of Colombia, and Medellin, a town in the interior of the Republic, fourteen bales of the goods were damaged—twelve of them by an abnormal delay in the transit which necessarily involved exposure of the goods to damp, one by accidental wetting, and another by accidental wetting and injury by worms:

Held, that the words "all risks by land and by water" must be read literally as meaning all risks whatsoever. The words were intended to cover all losses by any accidental cause of any kind, and as the damage to the goods was a loss within that category the underwriters were liable for it.

Pink v. Fleming (1890), 25 Q.B.D. 396, distinguished.

The policy was in the ordinary Lloyd's printed form upon goods at and from "on board the import vessel at Savanilla and/or Cartagena to any place or places in the interior of the Republic of Colombia, with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices and/or elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects and all clauses as attached.

"Warranted free of capture, seizure, and detention, and the consequences thereof or any attempt thereof, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

"Including all clauses, liberties, and exceptions as per Bills of Lading or charter-party.

"With leave to call at all ports and places on the passage, intermediate or otherwise, for any purpose whatsoever, and all liberties as per Bills of Lading. Including all risk of craft or boats to and from the vessel, and all risks (including fire) from the warehouse, factory, or calender, while in transit by railway or any conveyances, and while in warehouse and/or shed, or on wharf, whilst awaiting forwarding or shipment, and of transhipment and all risks by land and by water by any conveyance, until safely delivered into the consignee's warehouse or elsewhere.

"With leave to land, reship, unload and reload the property by the same steamer or any other conveyance, and to let the goods remain at the option of the assured anywhere until it is thought fit or convenient to send them forward.

"General average and salvage charges payable as per foreign adjustment, or per York-Antwerp rules, both or either if required.

"Any deviation and transhipment and/or change of voyage not covered by this insurance and/or any inaccuracy in description of voyage interest, name of vessel, clauses or conditions to be held covered at an adequate premium to be hereafter arranged.

"Including risk from the act of God, the king's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof.

" Including all risks excepted by the negligence clause which may be inserted in or attached to charter-party and/or Bill of Lading. Seaworthiness admitted."

There was another separate policy upon the ocean transit upon which no question arose.

The goods arrived at Savanilla on or about 20th August 1901, and were in transit to a town in the interior of the Republic called Medellin, and the route or transit covered by the policy was in stages from Savanilla by train to Barranquilla, thence up the river by boat to Puerto Berrio, thence by rail to Caracolli, and thence by mules to Medellin. Revolution had broken out in the Republic of Colombia in 1899, and civil war was still proceeding during the period between August 1901 and the time the goods were delivered at Medellin. Walton J. was inclined to think that the railway and river service from and during the latter part of 1901 until the earlier part of 1903 were abnormally disorganised. The goods were not delivered at Medellin until the early part of 1903 so that there was undoubtedly great delay. Although the disorganisation of transport was primarily due to the revolution, no defence was set up under the "warranted free from capture, etc., " clause as above. Walton J. gathered from the evidence before him that the climate was damp, and possibly the warehousing and storage accommodation was not very perfect. It was at any rate likely that if there was any unusual delay in the forwarding of the goods they would be exposed to damage from damp, and owing to the disorganisation and delay there was possibly damage by rain, and to some extent the delay was aggravated by the weather, and there appeared to have been a landslip which interfered with railway transport for some time during the period in question. The damaged bales were fourteen in all. With regard to twelve he came to the conclusion that the loss arose from the extraordinary delay and the abnormal exposure of those bales to damp. One bale by accidental wetting as distinguished from damp; it might have been wetted by rain or possibly got wet on the steamer in the river. The other bale he came to the conclusion suffered from accidental wetting, and also from injury by worms.

A defence was set up that the loss was not caused by any peril insured against and alternately to avoid the policy by reason of concealment of material fact, viz. deficiencies of means of transport such as might involve excessive delay. Walton J. held the defendant was not exempt on the ground of concealment having regard to what was known and must have been known as to the condition of Colombia.

WALTON J. (at page 670), after stating the facts and holding that the defendant had not made out his defence of concealment of material fact, continued: " Then comes the question, assuming the policy to be binding, ' Does it cover the loss in question ? ' That depends largely upon the construction of the policy, and I have felt great difficulty in dealing with the question. I have to look closely at the terms of the policy as to the risks insured against. The policy is in the ordinary Lloyd's form with clauses added. The clause written in at the top of the policy describes the transit, and these words are added: ' Including all risks of robbery with or without violence.' These words are added to make the policy cover robberies which might not perhaps be covered by the ordinary printed form of Lloyd's policy. The clause then goes on, ' all risks of damage by insects, and all clauses as attached.' Damage by insects would not

in my opinion be covered by the ordinary printed risks in a Lloyd's policy, so these words were intended to add something to the risks insured against. I have now to look at the clauses attached which must be read as if they were added after the words written in at the top of the policy, *i.e.* after the word insects. The clauses attached were on a slip pasted on."

(His Lordship then referred to several of the clauses in detail, stating that they did not refer to causes of loss insured against, and continued :)

(At page 671) "Then comes a clause which is peculiar : ' Including risk from the act of God, the king's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof.' That is a curious clause, as most of the risks mentioned there would be covered by the ordinary list of perils contained in the printed form of policy. That cannot be said as to the act of God, which is rather wider. The words seem to be an echo of the ordinary exception clause in a Bill of Lading, the clause having at some time been added without reference to the other clauses in the policy to make it clear that the owner of the goods should be protected by his policy in respect of losses as to which he would have no claim upon the Bill of Lading against the shipowner or carrier. The next clause is no doubt intended for the same purpose ; it is : ' Including all risks excepted by the negligence clause, which may be inserted in or attached to charter-party and/or Bill of Lading. Seaworthiness admitted.' The intention of that clause is that the policy should protect the owner of the goods from losses caused by these risks in respect of which he would have no claim against the shipowner. Looking at the policy including the written words and the clauses attached, it covers in the first place all losses occurring from any of the perils included in a Lloyd's policy in the ordinary form ; it undoubtedly includes other risks—risks of robbery with or without violence, damage by insects, etc., some of which may not be within the ordinary printed words of a Lloyd's policy. It is plain, therefore, that the policy was intended to cover something more than the ordinary risks. For the plaintiffs it was contended that during this transit the policy protected the assured from loss by all risks whatever by any conveyance from the time the goods were taken from on board the import vessel at Savanilla until they were delivered at the consignee's warehouse or elsewhere. The plaintiffs said that the words, 'all risks by land and by water,' etc., meant all risks whatsoever. It is very difficult to arrive at a conclusion with any certainty as to what the intention of the policy is. In considering the construction of such a policy—a marine policy—one is bound to give effect to all the well-known customs, which are perfectly understood in insurance business, as to the interpretation of such documents ; but after all, the rights of the parties depend upon the language of the contract. There have been established by a long line of decisions as to the interpretation of the contract contained in a marine policy many rules of construction, and there have been read into the contract many well established customs, the body of which makes up what is called the law of marine insurance. I must look at the whole of the policy to ascertain what the parties mean, not forgetting the effect of such rules and well-known customs. I think that sometimes one is too much inclined to deal with questions of this kind in a historical spirit. In my view it would be wrong to be astute or too subtle in trying to find out what underwriters

probably meant by clauses of this kind from a consideration of similar but not identical clauses which have come before the Court from time to time. Effect must be given to the expression 'all risks.' The phrase, in clauses somewhat similar, may mean nothing more than the risks insured against in the body of the policy. Taking the common clause, 'To include all risks of craft,' that may do no more than to extend to the goods while in craft the insurance against all risks which the goods while on board ship are insured against in the body of the policy ; or, in other words, such a clause may operate merely to extend the voyage, and not to add to the list of perils mentioned in the policy. But I may add that I do not know any case in which it has been decided that the ordinary clause as to risks of craft adds nothing to the perils insured against mentioned in the body of the policy. Sometimes underwriters are careful to prevent ambiguity by using the form 'all risks herein before insured against.' Referring to the material clause now in question and the words with which it begins, ' Including all risk of craft or boats to and from the vessel,' it may be that these words can be read as meaning not all risks of every kind whilst in craft or boats, but all the risks peculiarly incidental to the carriage of goods in boats or craft to or from the vessel. The clause, however, proceeds, ' and all risks (including fire) from the warehouse,' etc., 'while in transit,' etc., and finishes with the very general words, ' and all risks by land and by water by any conveyance until safely delivered.' Of course where parties desire to cover all risks of every kind, it can be done by simply saying, 'all risks whatsoever'; that is not the form adopted in the policy I am dealing with. The contract as a whole is not logically framed nor are the words of the clauses happily chosen, or with any apparent consideration of the language used in other parts of the policy. It was said for the defendant that, if all risks were covered, why refer specially to risks of robbery with or without violence, negligence, etc. On the other hand, it is very common to find in such contracts, although perfectly general words are made use of, including practically all risks, special reference to particular perils to which it is desired to draw special attention. *Jacob v. Gaviller* [1902] is an illustration of this being done. I have to read this policy as I think it would be reasonably understood by any merchant or insurance broker, and doing so I come to the conclusion that the words 'all risks by land and by water,' etc., must be read literally as meaning all risks whatsoever. I think they were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered in fact come within that category? Was the damage from some accidental cause? There must be a casualty. I think the loss was so caused. With regard to the twelve bales, there was an abnormal delay in the transit arising from unusual and accidental causes, which necessarily involved an exposure of the goods to damp. In the case of the twelve bales, therefore, the loss was an accidental loss, and covered by the policy. *A fortiori* the loss, the loss of the two remaining bales was covered."

(After stating the case differed from that of *Pink v. Fleming*, 1890, his Lordship continued :)

(At page 674) "Here if all accidental causes of damage were included—and I have held that they were—all that has to be considered is whether the damage that happened was the direct result of some accidental cause, and I consider that it was the direct result of an accidental cause. There will therefore be judgment for the plaintiffs."

SIMON, ISRAEL & CO. v. SEDGWICK (1893)

QUEEN'S BENCH DIVISION, COURT OF APPEAL, page 303.

Voyage—Attachment of risk—Land transit—Deviation clause—Change of voyage.

The plaintiffs, merchants at Bradford, effected an open policy with the defendants on merchandise, "as interest may appear or be hereafter declared, from the Mersey or London, to any port in Spain this side of Gibraltar, and thence by inland conveyance to any place in the interior of Spain." There was a marginal note providing that deviation or change of voyage not included in the policy was to be held covered at a premium to be arranged. The plaintiffs despatched goods from Bradford to Madrid expecting they would be carried, as former consignments had been, to Seville on this side Gibraltar, and thence to Madrid; but they were, in fact, shipped on a vessel from Liverpool to Cartagena and other ports beyond Gibraltar, and the Bills of Lading were made out to Cartagena. The plaintiffs declared the goods under the policy, and told the insurance-broker that the goods were going to Seville. The ship was lost before she touched at any port in Spain:

Held, affirming the decision of Wright J., that the risk had never attached, for the voyage to Cartagena was not one of the voyages covered by the policy, and that the defendants were not liable.

The risk insured against was stated to be as follows: "Lost or not lost, at and from the Mersey and/or London, both or either, to any port or ports in Portugal and/or Spain this side Gibraltar, and/or at or from thence by any inland conveyance to any place or places in the interior, including all risks by rail or steamer between Lisbon and Oporto, and including all risks by any conveyance whatever, from the time of leaving the warehouse in the United Kingdom until on board, in craft to and from vessel or vessels, of lighters on the river or elsewhere, and/or in transit, of transhipment, of steam navigation, and all risks of every kind until safely delivered at the warehouse of the consignees, including all liberties as per bills of lading.

"Deviation and/or change of voyage . . . not included in this policy, to be held covered at a premium to be arranged."

The vessel on which the goods were shipped cleared from Liverpool and was lost between that port and the west coast of Spain. On the vessel being reported missing the plaintiffs discovered for the first time that she was not bound to Seville at all, but to Carril and Huelva on the west coast of Spain, and to Cartagena and other ports on the east coast, and that the Bills of Lading had been made out for Cartagena. The plaintiffs immediately informed the underwriters of the mistake that had been made, and tendered the proper extra premium for Cartagena, but the offer was refused on the ground that the voyage to Cartagena was not one of the voyages covered by the policy.

LINDLEY L.J., after reading the material parts of the policy: "Now the real question which we have to consider is this, whether this policy ever did, or whether it never did, attach to goods sent by the persons for whom this policy was effected, from Bradford, under the circumstances which I will mention. These goods were intended by the plaintiffs to go to Madrid; and I think the correspondence shows that they intended to go by the mode in which similar goods

had gone before, that is to say, *via* Liverpool and Seville. Unfortunately these goods were not shipped from Liverpool to any port west of Gibraltar; but, by a blunder, I suppose, they were shipped to a port east of Gibraltar, namely, Cartagena—one of the places to which the ship was going. That port was not a port such as is described in the words which I have read, that is to say, it is not a port in Portugal or Spain 'this side Gibraltar.' It is true that they were lost this side Gibraltar, but they were on their way to a port beyond Gibraltar. . . . The plaintiffs say that upon the true construction of this policy this is a policy from Bradford to Madrid. . . . But it is contended that this is not a policy from Bradford to Madrid; and on consideration I have come to the conclusion that the view of the underwriters is right. We must ask ourselves what is the voyage that includes the risks to which I have alluded—the risks printed in type? It is an insurance from the Mersey to some port in Spain this side of Gibraltar; and unless these goods were insured for that voyage, there is nothing which brings in this extra risk from deviation. The starting-point is that the goods were insured from Liverpool to some place this side of Gibraltar. They never were on that voyage; and that being the case, you cannot extend the policy to cover the risks not included in the voyage for which these goods were insured. . . . I think the view taken by the learned judge is right, and that this policy never attached, and, that being so, the memorandum about deviation or change of voyage does not affect the question."

Bowden and A. L. Smith L.J.J. delivered judgments to the same effect.

SPENCE *v.* UNION MARINE INSURANCE
COMPANY (1868)

COURT OF COMMON PLEAS, vol. iii. page 437.

Claim on goods arriving at destination "in specie" but unidentifiable is not for total loss less salvage but for particular average.

Cotton belonging to different owners was shipped in bales specifically marked at Mobile for Liverpool: 43 bales belonged to the plaintiffs, and were insured by the defendants against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, and some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of bales were so obliterated by sea-water that none of the cotton lost or sold at Key West, and a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of the plaintiffs' 43 bales were identified, and these were delivered to the plaintiffs:

Held, that in respect of the cotton lost and that sold at Key West, there was a total loss of a part of each owner's cotton, and that all the owners became tenants in common of the cotton which arrived at Liverpool, and could not be identified; the share of each owner's loss in the cotton totally lost or sold at Key West, and his share of the remainder which arrived at Liverpool being in the proportion that the quantity shipped by him bore to the whole quantity shipped, according to the rule in cases of general average where it is not known whose goods are sacrificed; and, consequently, that

there was no total loss, either actual or constructive, of the plaintiffs' 41 bales.

The vessel on the 23rd October 1865, after having been at sea thirteen days, took the ground on Florida reef about eighty miles from Key West, and became a total wreck. The cargo was landed at Key West, all more or less damaged, and many of the bales broken, the marks and numbers on others entirely obliterated. Some bales were lost, and some were so damaged that they had to be sold at Key West. The remainder of the cotton was forwarded to Liverpool in a vessel chartered by the master at Key West.

Of the 2493 bales which were on board the vessel when she sailed on the voyage, 617 bales arrived in Liverpool in such a state that they could be identified, and they were delivered to the different consignees, but more or less damaged; 1645 bales were sold at Liverpool, the marks being so obliterated by sea-water that they could not be identified as belonging to any particular consignee; and 231 bales were either lost on the reef, or sold at Key West. Of the plaintiffs' 43 bales, 2 only could be identified in Liverpool, and these were delivered to the plaintiffs.

Subject to a question as to the correctness of the calculation, the underwriters had paid the plaintiffs their share (in the proportion of 43 to 2493) on the value of the cotton which was actually lost, and also (under an arrangement which was made for the sale of the cotton without prejudice to the rights of the parties) in the same proportion for the damage to the cotton which arrived at Liverpool but could not be identified.

It was contended on the part of the plaintiffs that as no one of their remaining 41 bales arrived in Liverpool in such a state that it could be identified, they were entitled to treat the loss as a total loss with benefit of salvage. It was conceded that, if it were an average loss only, the £122 paid into Court, plus the sum paid before action, would cover the plaintiffs' claim.

Due notice of abandonment of the 41 bales had been given by the plaintiffs.

The defendants contended that they were entitled to assume that of the plaintiffs' remaining 41 bales part were among those lost at Key West and part amongst those which arrived at Liverpool; and that, upon that assumption, the loss would be an average loss and covered by the payment into Court.

A verdict was entered for the plaintiffs subject to leave reserved to the defendants to move to enter the verdict for them.

A rule *nisi* was accordingly obtained to enter a verdict for the defendants or a non-suit.

The judgment of the Court (Bovill C.J., Willes, Keating, and Montague Smith J.J.) was delivered by BOVILL C.J.

(At page 435) ". . . The plaintiffs claimed to recover against the defendants as for a total loss of 41 bales of cotton. The defendants paid a sum of money into Court upon the principle of there having been a total loss of a small portion of the cotton and a partial loss only of the remainder, according to a calculation of the proportion that would be applicable to the plaintiffs' cotton with reference to the 231 bales which were actually lost, and the 1645 bales which arrived, but without any marks or the means of distinguishing the respective owners to whom those bales belonged. The principal question in the case was whether there was a total loss of the whole of the plaintiffs' 41 bales which were not delivered.

" The ground upon which the plaintiffs contended for such a total loss was, that the whole 41 bales must be considered as included in the 231 bales, or that, by the perils of the seas, the marks on the plaintiffs' bales, as well as upon other bales of cotton in the same ship, and which reached this country, had become obliterated, so that it was impossible to distinguish one person's cotton from that of another and therefore impossible for the plaintiffs to obtain the identical bales which they had insured.

" Subject to a subordinate question as to the correctness of the calculation, the plaintiffs had been paid their proportion of the cotton that was actually lost, and had been offered what would be their proportion of the cotton which was saved, or rather, its equivalent in money was paid to them under the arrangement that was made for sale of the cotton without prejudice to the rights of the parties ; but, the price of cotton having fallen very materially in the market, the plaintiffs endeavoured to treat the obliteration of the marks, and the consequent impossibility of identifying any of the bales except the two which were delivered to them, as a total loss, and contended that, as the impossibility of the shipowner delivering to them their identical bales of cotton had been caused by the perils of the seas, it was a total loss, either actual or constructive, within the meaning of the policy.

" It is manifest that the plaintiffs' argument would equally apply if not a single bale of cotton had been lost or damaged out of the whole cargo, and if the marks only had been obliterated from this and other cotton by the same vessel, and it would lead to the strange anomaly that although all the goods which had been put on board arrived safely at their destination, there would, according to the plaintiffs' contention, be a total loss, for the purpose of insurance law, of the whole of them. Indeed, in every case of the accidental confusion of goods on board a ship, so that they could not be identified, where it arose from the perils of the seas, if the principle contended for by the plaintiffs be correct, it might be said that the shipowner was absolved from any liability to deliver the goods, and this strange conclusion would also follow, that if the cargo all belonged to one owner, it might be said to be entirely safe and uninjured, under circumstances in which if there were two owners, however small the proportion of one of them, it must be said to be totally lost ; so that if one shipper owned 99 bales and another 1 of the same description, and by reason of the stranding of the vessel all were transhipped with the loss of marks, after which the cargo arrived safe, each owner would have wholly lost all he had, because neither could affirm as to any given bale that it belonged to him. Practically, in such a case the owner of the one bale would receive one of the bales, either by delivery of the shipowner or by agreement, and probably be content, and this ought to operate as a partition, so as to vest the residue in the owner of the larger share.

" We must, thus, necessarily consider what is the effect of the obliteration of marks upon various goods of the same description which are shipped in one vessel, and which, without any fault of the owners, become so mixed that one part is undistinguishable from another ; and it seems to us not altogether immaterial to inquire in whom the property in the goods is vested under such circumstances, or whether they become *bona vacantia*, and pass to the first finder, or to the Crown. In endeavouring to arrive at a conclusion upon that subject we should be guided by any direct authorities as well

as by analogous cases in our own law, and by the principles of law which have been laid down and established in our Courts ; and as the rules and principles of our mercantile and maritime law are in a large measure derived from foreign sources, we gladly avail ourselves of the codes and laws of other countries, and especially of the Roman Civil Law, to see what amongst civilized nations has usually in like cases been considered reasonable and just.

“ In our own law there are not many authorities to be found upon this subject, but as far as they go they are in favour of the view that, when goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn J. in the case of the tallow which was melted and flowed into the sewers is to that effect : *Buckley v. Gross* (1863). And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship in *Jones v. Moore* (1841).

“ It has been long settled in our law that, where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion or any part of the property, from the other owner : but no authority has been cited to show that any such principle has been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners ; and there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, and become *bona vacantia*.

“ The goods being before they are mixed the separate property of the several owners, unless, which is absurd, they cease to be [their] property by reason of the accidental mixture, when they would not so cease if the mixture were designed, must continue to be the property of the original owners ; and as there would be no means of distinguishing the goods of each, the several owners seem necessarily to become jointly interested, as tenants in common, in the bulk.

“ This is the rule of the Roman Law as stated in Mackeldey’s *Modern Civil Law* under the title “ *Commixtio et Confusio*, ” in the special part, Book I. s. 270. In the English edition of 1845, at p. 285, the passage is as follows : ‘ The mixing together of things solid or dry (*commixtio*), or of things liquid (*confusio*), which belong to different owners, has no effect upon their rights in the things, if the latter can be separated. If, on the other hand, such separation is not practicable, then the former proprietors of the things now connected will be joint owners of the whole, whenever the mixture has been made with the consent of both parties or by accident.’

“ We need not discuss the distinction made sometimes between *commixtio* and *confusio* apparently upon the ground that it is possible to separate the individual solid particles but not the liquid ; because, in cases like the present it is impracticable, and for all business purposes therefore impossible, to distinguish the particles, in respect of ownership.

“ The passages in Mr. Justice Story’s work on *Bailment*, s. 40, and in the ninth volume of *Pothier, De la Confusion*, as well as the French and various other codes, are to the same effect.

“ We are thus, by authorities in our own law, by the reason of the thing, and by the concurrence of foreign writers, justified in adopting

the conclusion that, by our own law, the property in the cotton of which the marks were obliterated did not cease to belong to the respective owners ; and that, by the mixture of the bales, and their becoming undistinguishable by reason of the action of the sea, and without the fault of the respective owners, these parties became tenants in common of the cotton, in proportion to their respective interests. This result would follow only in those cases where, after the adoption of all reasonable means and exertions to identify or separate the goods, it was found impossible to do so.

" We cannot assume that the whole of the plaintiffs' 41 bales were amongst those that were destroyed, any more than we can assume that they all formed part of the 1645 which were brought home ; and we see no means of determining the extent of the interest of the several owners, except by adopting a principle of proportion, and which would, we think, be equally applicable in determining the plaintiffs' portion of the 231 bales that were totally lost as of the 1645 which arrived in this country, though without the marks.

" The principle of proportion is that which was applied by Lord Ellenborough, where one gross sum was paid to a broker in respect of two debts due to different principals without distinguishing how much was paid in respect of each : *Favenc v. Bennett* (1809). It is also the principle adopted in cases of general average and of jettison, where it is not known whose goods are sacrificed, as stated by *Caesaregis* and *Emerigon* in the passages that were quoted in the argument ; and we think it is the proper principle to apply to this case.

" Upon the main question, therefore, that was argued before us, we think that there was not an actual total loss of the plaintiffs' 41 bales of cotton. We think also there was not a constructive total loss of those bales. We adopt the principle upon which the defendants have paid money into Court, and our decision upon this question is in their favour.

" It was attempted to show by calculations what was the probability of the plaintiffs' bales being included or not in the quantity totally lost ; but in the absence of information as to the part of the vessel in which those bales were stowed, so as to show whether they were exposed, and to what extent, to the perils, which caused the total loss of the bales that perished, it is obvious that such calculations can result only in dry formulæ of combinations, subject to be disturbed by the missing element of extent of exposure to danger, and that they furnish no practical assistance upon the one side or upon the other.

" It was upon a calculation of this description that Mr. Griffith Williams on behalf of the plaintiffs, for the first time at a very late stage of the argument, contended that, assuming the defendants' principle to be correct, yet that it had not been correctly applied. Mr. Williams has, however, failed to satisfy us that the calculation was incorrect. It seems to us that so far as it is practicable and without entering into every minute circumstance and probability connected with the state of the weather and of the vessel, the position of the different parts of the cargo and the effects of the sea and weather upon the vessel and cargo, upon which there was no evidence, the amount paid into Court, together with the other payments, is sufficient to cover the plaintiffs' claim so far as it was proved for an average loss.

" Upon the remaining question which was raised, as to whether, if

there were a total loss, it was a loss proximately by the perils of the seas, it is not necessary to pronounce any opinion.

“Our judgment is in favour of the defendants. . . .”

THE THAMES AND MERSEY MARINE INSURANCE
COMPANY *v.* PITTS, SON, AND KING (1893)
QUEEN'S BENCH DIVISION, vol. i. page 476.

A cargo of maize was insured from San Nicolas and Buenos Ayres to a port in Europe; the subject-matter of the insurance was described in the policy to be “26,910 bags of maize from San Nicolas £6065 at 1 per cent”; 8299 bags of maize from Buenos Ayres £1875, at $\frac{1}{2}$ per cent; and the policy contained a further statement that by agreement the goods were valued at “£7940 (included £1361:6:6 for advance on freight).” The policy covered all risks in craft, and contained a warranty against particular average, unless the ship or craft should be stranded. The 26,910 bags were shipped at San Nicolas; but while on her way down the river to Buenos Ayres the ship was stranded; at that time the 8299 bags were in lighters in Buenos Ayres roads awaiting her arrival. Ultimately, the ship was got off and proceeded to Buenos Ayres, where she was surveyed, and found to be seaworthy; the cargo from San Nicolas (which had been taken out) was reshipped, the 8299 bags waiting in the lighters were put on board, and the ship proceeded on her voyage to Europe, in the course of which a large part of the cargo was damaged by water, owing to perils of the seas. It was admitted that a claim for particular average in consequence of the stranding arose in respect of the bags shipped at San Nicolas; but the assured claimed to be entitled to recover also in respect of the bags shipped at Buenos Ayres; and they further contended that the loss should be calculated upon the full £7940, without any deduction in respect of freight advanced.

Held, first, that, as at the time of the stranding of the ship the 8299 bags were only at risk in the craft and not at risk in the ship the warranty attached, and the assured were not entitled to recover a particular average loss in respect of such bags; secondly, that the policy was to be treated as one policy upon valued goods, and not as a policy by which advanced freight was separately insured, and that therefore the particular average loss should be calculated upon the full amount of £7940.

The plaintiffs, on account of any claim which the defendants might be able to establish under the policy in respect of the damage, but without prejudice, paid to the defendants the sum of £250.

The plaintiffs' claim was for £32:6:2 overpaid in respect of the damage sustained by the 8299 bags of maize shipped at Buenos Ayres.

The questions for the opinion of the Court were:

(a) Whether or not the defendants were entitled to claim under the circumstances for the particular average loss on the 8299 bags maize shipped at Buenos Ayres.

(b) Whether, in estimating the amount of the particular average loss, the amount of the freight advanced should be deducted from the valuation of the maize in the policy.

DAY J. (at page 484, after reciting the facts of the case, and the questions at issue, continued at page 485):

"I have come to the conclusion that the claim of the assured is ill-founded, and that they have no claim in respect of the maize not on board the ship at the time of the stranding. If we consider the character of this policy, it is no doubt one policy in this sense, that it is contained in one paper and is made between one cargo-owner and one underwriter, or set of underwriters; but in one sense it is a policy to cover two different voyages, one from San Nicolas to Europe, the other from Buenos Ayres to Europe, though the routes from Buenos Ayres to Europe are of course the same. Although the goods are in the same ship, the risk insured against is a different risk in the one case to what it is in the other; in one it lasts all the way from San Nicolas, in the other it is limited to the voyage from Buenos Ayres; and it is to be further noted that the respective lots of maize are of different weights and values, and the rates of premium are different. It is difficult to suppose that there could be any argument on behalf of the assured, but for the special conditions in the margin of the policy, 'including all risks of steam navigation, and in craft or transhipment, or while waiting transit and/or any conveyances from the shippers' warehouses to those of the consignees. Each craft, or the total loss of any package to be considered as if separately insured.' Those conditions apply to the maize when in craft; and undoubtedly under this policy the maize when in craft was insured, and if any misfortune happened to it in craft, the assured could recover on the policy. But though insured while in craft, it does not follow that the maize was insured at the same moment, both as being in craft and as being in the ship. It is in craft at one time, and in the ship at another, and the two periods of time are consecutive not contemporaneous; it is insured in the craft while it is in the craft and in the ship while it is in the ship, the risks and incidents of the policy being equally applicable whether it is in craft or ship. When this ship was stranded the goods were in craft, and I think that as regards them the only stranding for which the underwriters could be responsible under the policy would be a stranding of the craft while the goods were in craft. To deal in any other way with the provisions of this policy would be to place an inconvenient and unreasonable construction on the warranty. In my opinion the warranty and the exception are merely incidental to the risk; without the risk there is no warranty and no exception; here there was no risk as to this part of the cargo at the time of the ship's stranding, for it was not in the ship, and therefore neither the warranty nor the exception is applicable. In my opinion, there were here substantially two insurances of different lots of maize at different rates for different voyages, and this stranding is only to be taken advantage of by those persons who were at that time paying the higher rate of insurance upon the longer voyage in respect of goods then on board and at risk, and the defendants are not entitled by reason of this stranding to recover in respect of a particular average loss upon the maize which was then in craft, against which they have in my judgment warranted the underwriters. The plaintiffs are therefore entitled to recover the sum of money overpaid by them applicable to the particular average loss on the 8299 bags which had been allowed by the average adjusters to the assured.

"Upon the second question asked us, I am of opinion that the defendants have an answer to the plaintiffs' claim, and that they have made out that the amount allowed in respect of advanced

freight ought to be allowed by the average adjusters to the assured. Putting the best construction that I can upon this policy, it seems to me that it is really an insurance on valued goods, and that it is not vitiated by reason of the fact that out of abundant caution the merchant has said that he has taken into account as part of the value the money paid on account of freight, and that he values the goods, not at the port of purchase, but at the port of their destination. I cannot think that he loses the benefit of a valued policy on his goods by saying that he takes their value at the port of destination, and further stating the amount of money, which in order to arrive at that value, he had added to their cost at the port of shipment. It seems to me that this is quite legitimate, and that the policy is not affected by the merchant saying how he works this sum. The policy should not be treated as one on valued goods to a lesser amount, with a further policy in respect of freight, but as a policy on valued goods with an explanation of the way in which the amount is arrived at. I think, therefore, that upon this branch of the case the plaintiff's claim fails."

COLLINS J. (at page 487): "The answer to the question seems to depend on whether or not the stranding took place during the adventure. If it did, it is clear law that it is immaterial whether the actual mischief can be traced to the stranding; but that is a very different thing from saying that it is immaterial when the stranding took place. The stranding is dealt with by the contract between the parties under which it is one of the risks insured against. If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average loss whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with commonsense, but is abundantly supported by authority. In *Roux v. Salvador* [1836], which follows the earlier decisions, the point decided was that, where during a voyage the ship sprung a leak, and the goods were landed and sold at a port short of their original destination, and the ship was afterwards stranded on her voyage to the port of destination when those goods were no longer on board, there was no particular average loss in respect of which the assured could recover, and in order to reach this decision it was necessary to examine the principle, and that principle applies equally to a stranding before the risk has attached to the goods as to a stranding after the risk has ceased to attach. In his judgment in that case Tindal C.J. said: 'The general principle laid down in *Burnett v. Kensington* [1797], that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed; the policy, after the stranding, must be construed as if no such warranty had been written on the face of it. But the question is, within what limits of time a stranding must take place in order to produce such effect. Now every other clause in the policy relates to the voyage insured, and to that alone; the liability of the underwriter on goods commences with the putting them on board, and ceases upon their being discharged and safely landed, or with any other legal termination of the adventure. The clause in question, therefore, as it appears to us, ought to be construed with the same restriction; and the stranding, which is made the condition of letting in an average loss, ought, upon the ordinary rules of construction to be considered to mean a stranding which takes place after the adventure has commenced, and before it has terminated.'

"If we consider the reason for this rule it is obvious that it must be so. A stranding has taken place during an adventure, and the question arises (or rather used to arise) whether the particular damage is capable of being attributed to that stranding. To embark upon that inquiry necessarily involved such a long and difficult examination of the circumstances that by convention of the parties, as Lord Kenyon put it in *Nesbitt v. Lushington* [1792], where a ship stranded, the underwriters agreed to ascribe the damage to the stranding ; but in order to so ascribe it, the stranding must take place in the course of the adventure. Does this case come within that principle ? The defendants contend that it does, and that the stranding did take place in the course of the adventure, because the goods were at risk. But that only puts the difficulty one stage further off, and we must inquire, not merely whether the goods were at risk, but whether they were at '*the*' risk contemplated in the adventure. In my opinion they were not. The adventure contemplated in the provision as to stranding of the ship is limited to the time after which the goods are put on board the ship ; the anterior state of things is dealt with by a separate contract or a separate specific provision covering the time when the goods are in craft. But for that provision as to risk while in craft, it could not be contended that the antecedent stranding would let in a right to claim in respect of a particular average loss, subject to this remark, that the defendants contend that the antecedent stranding was traceable in its effect upon these particular goods, and did as a fact cause part of the damage to them. As to this it is said that the stranding so affected the ship, and put her in such a condition that the subsequent straining brought about damage to the goods, which would not have happened but for the antecedent stranding. But that point is, I think, disposed of by the fact that the ship was surveyed and found seaworthy at the commencement of the adventure—that is, when the goods were put on board at Buenos Ayres—which prevents the antecedent stranding having any connection in point of fact with the subsequent damage. Moreover, when analysed, this seems to be really the same point that we have already decided, and to be an attempt to introduce into the adventure something that happened before the adventure. Upon the first part of the case, therefore, I am of opinion that the plaintiffs have made out their claim.

"The second point is whether the ascertained percentage should be allowed as upon the whole value of £7940 or only upon that value less £1361, the amount of the advanced freight. It seems to me that the question for us is simply a question of the meaning of the parties in framing the contract in these terms. Did they intend to insure cargo agreed at a certain value or did they intend to insure cargo agreed at a certain value and advanced freight at an ascertained amount ? If the latter, the defendants are wrong, if the former they are right. Looking at the whole of the language, I think that what they meant was to value the cargo, and to insure a valued cargo. They valued the goods and merchandise, and gave them a conventional value by an agreement between assurer and assured—£7940 including £1361 for advance on freight. By adding those words they have not, as it seems to me, entitled themselves to say that they have acquired an insurance upon advanced freight, and they could not maintain such a position if the underwriters disputed it. The underwriters might well answer, ' Although it is true that you mentioned this sum as advanced freight, yet in the same sentence

you agreed that it should be treated as part of the value of the cargo, and therefore, if the circumstances do not admit of your recovering as upon a loss of the goods, the contract does not entitle you to claim as upon an independent insurance on advanced freight.' The advanced freight is simply thrown in as part of the value of the goods, and in my judgment the right to recover in respect of advanced freight stands or falls with the right to recover for loss of cargo. Upon that part of the case, therefore, the inference which I draw is in favour of the defendants.

"As the result of our answers to the questions asked in the case, the claim of the defendants upon the policy will be readjusted by calculating the particular average on £6065, the value of the maize shipped at San Nicolas without deduction in respect of the advanced freight."

TYRIE *v.* FLETCHER (1777)

COWPER, vol. ii. page 666.

Time policy, no return for unexpired time in case of loss from excepted peril.

Upon a policy at and from a port to any other port or place whatsoever for twelve months, "warranted free from capture," the risk is entire; and therefore if once begun there shall be no return of premium.

The policy was upon the ship *Isabella*, at and from London, to any port or place, where or whatsoever, for twelve months, from the 19th August 1776 to 19th August 1777, both days inclusive, at £9 per cent warranted free from captures and seizures by the Americans. The ship sailed from London, and was taken by an American privateer about two months afterwards.

LORD MANSFIELD (at page 668): "It is very proper to save this case for the opinion of the Court, because in all mercantile transactions certainty is of much more consequence, than which way the point is decided; and more especially so, in the case of policies of insurance; because if the parties do not choose to contract according to the established rule they are at liberty as between themselves to vary it. This case is stripped of every authority. There is no case or practice in point; and therefore we must argue from the general principles applicable to all policies of insurance. And I take it, there are two general rules established applicable to this question: [1] The first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned. Because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and therefore he ought to return it. [2] Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no point of the consideration shall be returned; and yet it is as easy to

apportion for the length of the voyage as it is for the time. If a ship had been insured to the East Indies agreeably to the terms of the policy in this case, and had been taken twenty-four hours after the risk was begun by an American captor, there is not a colour to say that there should have been a return of premium. So much then is clear ; and indeed perfectly agreeable on the ground of determination, in the case of *Stevenson v. Snow* [1761]. For in that case the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two insurances*, and a division between them. The first object of the insurance was from London to Halifax ; but if the ship did not depart from Portsmouth, with convoy (particularly naming the ship appointed to be convoy), then there was to be no contract from Portsmouth to Halifax ; why then, the parties have said, 'We make a contract from London to Halifax, but on a certain contingency it shall only be a contract from London to Portsmouth.' That contingency not happening, reduced it in fact to a contract from London to Portsmouth only. The whole argument turned upon that destination. Mr. Yates who was for the plaintiff put it strongly upon that head ; and all the judges, in delivering their opinion, lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages ; and it was the equitable way of considering it ; for though it was at first consolidated by the parties, there was a defeazance afterwards though not in words. I think Mr. Justice Wilmet put it particularly upon that ground, but it was the opinion of the whole Court. There was a usage also found by the jury in that case, that it was customary to return a proportionate part of the premium in such like cases, but they could not say *what* part. The Court rejected this as a usage for the uncertainty ; but they argue from it that there being such a custom, plainly showed the general sense of merchants as to the propriety of returning a part of the premium in such cases ; and there can be no doubt of the reasonableness of the thing. There has been an instance put of a policy where the measure is by time, which seems to me to be very strong, and opposite to the present case ; and that is an insurance upon a man's life for twelve months. There can be no doubt but that the risk there is constituted by the measure of time, and depends entirely upon it, for the underwriter would demand double the premium for *two* years that he would take to insure the same life for one year only : In such policies there is a general exception against suicide : If the person puts an end to his own life the next day, or a month after, or any other period within the twelve months, there never was an idea in any man's breast that part of the premium should be returned. A case of general practice was put by Mr. Dunning, where the words of the policy are : 'At and from, provided the ship shall sail before the 1st of August.' And Mr. Wallace considers in that case that the whole policy would depend upon the ship sailing before the stated day. I do not think so ; on the contrary, I think with Mr. Dunning that cannot be. A loss in port *before* the day appointed for the ship's departure can never be coupled with a contingency after that day ; but if a question were to arise about it, as at present advised, I should incline to be of opinion that it would fall within the reasoning of the determination in *Stevenson v. Snow* ; and that there were *two* parts or contracts of insurance with distinct conditions. The first is, I insure the ship in port, provided she is lost in port before the 1st August ; and second, if she is not lost in port, I insure her then during her voyage,

from the 1st August, till she reaches the port specified in the policy. The loss in port must happen before the risk upon the voyage could commence ; and *vice versa* the risk in port must cease, the moment the risk upon the voyage began. Let us see then what the agreement of the parties is in the present case. They might have insured from two months to two months ; or in any less or greater proportion, if they had thought fit to do so ; but the fact is they made no *division of time at all* ; but the contract entered into is one entire contract from the 19th August 1776 to the 19th August 1777 ; which is the same as if it had been expressly said by the *insured*, 'If you, the underwriter will insure me for twelve months, I will give you an *entire* sum, but I will not have any apportionment.' The ship sails, and the underwriter runs the risk for *two* months. No part of the premium then shall be returned ; I cannot say, if there had been a recapture before the expiration of the twelve months that the policy would not have revived.'

Ashton, Willes, and Ashhurst JJ. were of the same opinion.

WELLS *v.* HOPWOOD (1832)

BARNEWALL AND ADOLPHUS, vol. iii. page 20.

Stranding in tidal harbour—Interpretation of memorandum.

• A ship having on board goods which were insured on a voyage from London to Hull, but "warranted free from average unless general or the ship should be stranded," arrived in Hull harbour which is a tide harbour, and proceeded to discharge her cargo at a quay on the side of it ; this could be done at high water only, and could not be completed in one tide. At the first low tide, the vessel grounded on the mud, but, on a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour, stretched, and the wind blowing from the east at the same time, she did not ground entirely on the mud, which it was intended she should do, but her forepart got on a bank of stones, rubbish, and sand, near to the quay, and the vessel having strained, some damage was sustained by the cargo, but no lasting injury by the vessel :

Held, by Lord Tenterden C.J., Littledale and Taunton JJ. (Parke J., dissentiente), that this was a "stranding" within the meaning of that word in the policy.

At the trial before Parke J. the plaintiff was non-suited subject to the opinion of the Court.

LORD TENTERDEN C.J. (at page 54) : "Several of the cases hitherto decided on this subject are, as to their facts very near to each other, and not easily distinguishable. But it appears to me that a general principle and rule of law, may, although not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this : where a vessel takes the ground in the ordinary and usual course of navigation and management in a tide river or harbour, upon the ebbing of the tide, or from natural deficiency of water so that she may float again upon the flow of the tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But where the ground is taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence, such an event shall be considered a stranding within the meaning of the memorandum. According to the construction that has been long

put upon the memorandum, the words, 'unless general or the ship be stranded,' are to be considered as an exception out of the exception as to the amount of an average or partial loss, provided for by the memorandum, and, consequently, to leave the matter at large according to the contents of the policy; and as every average loss becomes a charge upon the underwriters, where a stranding has taken place, whether the loss has been in reality occasioned by the stranding or no, the true and legal sense of the word 'stranding' is a matter of great importance in policies upon goods. In such policies, the inquiry is whether a loss arose by perils of the sea, and the question is consequently unfettered by any technical phrase. Upon the facts of this case, it appears to me that the event which happened to this ship is within the second branch of the rule as above proposed. If the rope had not slackened, and the wind had not been in such a direction as it was, the vessel would have remained safe during the night; for although raised by the influx of the tide, she would at ebb have grounded again on the soft and even bottom over which she had been placed. The events that occurred, unusual and accidental in themselves, caused the vessel to quit that station, and go in part to another, where upon the ebbing of the tide her forefoot rested on a stony bank, so as to be above her remaining part, and to cause the straining by which the cargo was injured from the influx of water through the opening of the planks.

"I should observe that my judgment in this case is not founded upon the fact of injury to the cargo or of the want of injury to the ship; I do not consider either of those circumstances as being properly an ingredient in the question.

"The rule as proposed will probably be found consistent with the cases quoted at the bar, and which it is not necessary for me to repeat. I will only observe that the facts of the case of *Bishop v. Penland* [1827] cannot, in my opinion, be distinguished in effect from those of the present case; it is the last decision on the subject. It cannot be decided that this is not a case of stranding without overruling that decision. The rule as proposed upholds the decision in that case; and for the reasons given I think this is a case of stranding, and the verdict must be entered for the plaintiff."

Taunton and Littledale JJ. delivered judgments to the same effect; Parke J. delivered judgment for the defendant.

WILSON *v.* BANK OF VICTORIA (1867)

2 Q.B.D. 203

Ship—General average—Sailing ship with auxiliary steam screw—Substitution—Cost of extra coals.

A clipper sailing ship, *The Royal Standard*, of 2000 tons, with an auxiliary steam screw of 130 horse power, and carrying about 550 tons of coal, sailed on a voyage from Australia to England. After eleven days she came in collision with an iceberg, and suffered so much damage in her masts and upper works on one side, as practically to have lost all power of sailing. She reached Rio de Janeiro under steam alone, having nearly exhausted her stock of coals. The repairs necessary to restore her sailing powers would have cost at Rio many thousand pounds more than in England, and would have occupied several months, and the cargo would have had to be unshipped and warehoused. The captain, therefore, had only temporary

repairs done (which took three days) sufficient to enable him to complete his voyage under steam alone; and in order to do this he had to purchase coals at Rio, and again at Fayal. The voyage having been accomplished under steam alone, the shipowners sought to charge the cost of the coals against shippers of cargo as general average; either on the principle that the expenditure was a substitution, beneficial to all parties, for a greater expenditure, which the captain had a right to incur by repairing at Rio, and ought to be apportioned in the same way as the greater expenditure would have been; or as an extraordinary expenditure for the general advantage of all interests concerned:

Held, assuming the repairing at Rio would have been justifiable, and any of the incidental expenses chargeable against the shippers as general average, *that there was no legal principle on which expenses incurred by one course could be apportioned according to what might have been the facts if a different course had been adopted.*

Secondly, that the shipowners, by the contract of affreightment on such a ship, were bound to give the services of the auxiliary screw, and to make all the necessary disbursements for fuel; and although the circumstances caused these disbursements to be extraordinarily heavy, they did not render them an extraordinary expenditure within the rule as to general average.

Plaintiff's Counsel.—As the captain had the right to do the repairs at Rio necessary to restore the vessel's sailing powers, and charge general average accordingly, the course he adopted was a proper substitution for the advantage of all parties, and the cost of this substitution must be paid in the same proportion by all parties benefited.

BLACKBURN J.—This principle of substitution is quite novel.

Plaintiff's Counsel.—The average staters gave some instances in which it had been applied and the general average paid.

BLACKBURN J.—Two or three instances in which the claim has been submitted to prove nothing.

Plaintiff's Counsel.—In *Taylor v. Curtis* (2 Marsh. p. 318), 1816, Gibbs C.J. puts usage as one of the modes of deciding what is general average.

BLACKBURN J.—No doubt; and had a general custom been shown it might be another matter.

In the judgment BLACKBURN J. remarked: "We think that the expenses actually incurred must be apportioned according to the facts that actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued."

SUPPLEMENTARY EXTRACTS FROM JUDGMENTS IN LEADING CASES ON GENERAL AVERAGE

ATTWOOD *v.* SELLAR (1880)

ASPINALL'S MARITIME LAW CASES, vol. iv. page 283
(COURT OF APPEAL).

Ship and shipping—General average sacrifice—Putting into port to repair—Expenses of warehousing and reloading goods—Pilotage charges on leaving port.

Where a vessel has put into port to repair an injury occasioned by a general average sacrifice, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average.

The practice of British average adjusters for the last seventy years dissented from.

Judgment of the Queen's Bench Division affirmed.

SPECIAL CASE

1. The plaintiffs are the owners of the ship *Sullivan Sawin*, and the defendants are owners and consignees of goods shipped on board the said vessel on the voyage hereinafter mentioned.

2. The said vessel sailed from Severnake to Liverpool on the 10th February 1877, and encountered severe weather, in consequence of which a general average sacrifice became necessary, and was made, the Master being compelled to cut away the foretopmast, the fall of which occasioned further damage to the vessel, which was thereby compelled to put into Charleston on the 21st February 1877, to repair the said damage.

3. In order to effect the said repairs and to enable the vessel to proceed on her voyage it was necessary to discharge a portion of the cargo, and expenses were incurred in landing, warehousing, and re-shipping the same, and further expenses were incurred at Charleston for pilotage, and other charges paid in respect of the ship leaving port and proceeding upon her voyage. The said vessel afterwards completed her voyage and discharged her cargo at Liverpool.

4. It is, and for from seventy to eighty years past has been, the practice of British average adjusters, in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as general average, the expense of warehousing it as particular average on cargo, and the expense of the reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight. Cases of putting into port in consequence of general average sacrifice only, and

where there is no particular average loss at all, are not of frequent occurrence ; but such cases, and cases where the substantial cause of the putting into port is a general average sacrifice, are sufficiently common to establish a regular practice of treating the expenses in case of a general average sacrifice in the way above described.

5. Average adjusters regulate their rules of practice in accordance with what they consider are the legal principles applicable to the subject. There is an association of average adjusters which holds meetings from time to time at which the rules of practice are discussed and altered or modified with reference to legal decisions.

6. In March 1876, one eminent average adjuster formed the opinion that the practice as above described was wrong, and that all such expense as heretofore described up to the time when the ship was again at sea, and had resumed her voyage, ought to be charged to general average ; and since March 1876 the said average adjuster had made up adjustments in two or three cases of the kind in accordance with his said opinion ; but the practice of British average adjusters as above described has remained unaltered.

7. The case of the said ship, the *Sullivan Sawin*, was put into the hands of the said average adjuster to prepare the adjustment, which he did in accordance with his said opinion, charging the whole of the said expenses to general average, and the plaintiffs have brought this action against the defendants to recover the contribution appearing to be due from them in respect of their goods upon the footing of the said adjustment. The defendants have always been willing to pay a general average contribution upon the footing of an adjustment made up in accordance with the practice of British average adjusters as above described, but deny their liability to pay upon the footing of the said average adjustment which has been prepared as aforesaid, and this action was brought for the purpose of determining whether or not they are liable.

8. The plaintiffs contend that, notwithstanding the said practice of British average adjusters, they are entitled to have the whole of the said expenses brought into general average, and to receive a contribution from the defendants accordingly : and the defendants contend, first, that apart from the said practice, general average expenditure ceases in such cases when the cargo has been discharged from the ship ; and, secondly, that the said practice of average adjusters is a valid and binding custom regulating the treatment of the said expenses, and the contribution to be paid by the defendants.

The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover against the defendants a contribution in excess of what would be payable according to the said practice of average adjusters as stated in this case.

The Queen's Bench Division gave judgment for the plaintiffs (Cockburn C.J. and Mellor J., dissentiente Manisty J.).

The defendants now appealed.

The judgment of the Court (Bramwell, Baggally, and Thesiger L.J.J.) was delivered by THESIGER L.J. (at page 286) : "The question raised by this appeal is, Whether in the case of a vessel going into port in consequence of an injury which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average also.

"The matter came before the Court below in the form of a special

case, and upon it the Court decided in favour of the plaintiffs, who assert that the expenses in question are the subject of general average. The special case states a long continued practice of British average adjusters in adjusting losses in cases where ships have put into port to refit, whether such putting into port has been occasioned by a general average sacrifice or a particular average loss, to treat the expense of discharging the cargo as a general average, and the expense of warehousing it as particular average on the cargo, and the expense of reshipment of the cargo, pilotage, port charges, and other expenses incurred to enable the ship to proceed on her voyage, as particular average on the freight. It was not, however, and could not reasonably be contended for the defendants that the practice could be put so high as a custom impliedly incorporated in the contract between the parties, and during the course of the argument we intimated our opinion, founded on the language of the special case with regard to this practice, and especially the language of the fifth paragraph, that the question between the parties must be decided in accordance with legal principles and authority which the practice of the average adjusters professes to follow. The law governing the case is admittedly English law, for the expenses in dispute arose upon a voyage, the proper and actual termination of which was an English port. As a matter of principle, we are clearly of opinion that the judgment of the majority below in favour of the plaintiffs was right. The principle which underlies the whole doctrine of general average contribution is that the loss, immediate and consequential, caused by a sacrifice for the benefit of ship, cargo, and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods for the purpose of doing the necessary repairs to the vessel to enable it to proceed on its voyage, to be the subject of general average contribution; but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded; and that general average ceases at the point of time when the common danger is at an end. This proposition is, as will appear later, sound when applied to cases in which a ship is damaged by perils of the seas, and before any voluntary sacrifice, such as putting into an intermediate port, is made, the goods are unshipped and in safety; but its application to a case like the present is not admissible. A vessel which has put into port to repair an injury, occasioned by a general average sacrifice, may be and generally is when in port in perfect safety; and if by the expression 'common danger' be meant danger of actual injury to vessel and cargo, there is no more danger to the goods when on board the vessel being in port than when stowed in a warehouse on shore; and, indeed, in many cases only a portion of the goods is removed from the vessel in order to do the repairs to her, while the remainder of the goods is left on board. If, on the other hand, by 'common danger' be meant the danger of the vessel with her cargo being prevented from prosecuting her voyage, then there is no more reason why the expenses of warehousing and reloading, and the expenses incurred for pilotage and other charges paid in respect of the vessel leaving port and proceeding on her voyage, should not constitute general average, than there is reason for saying that unloaded and warehoused goods should not

SUPPLEMENTARY EXTRACTS

contribute, as it is clear in the case of voluntary sacrifice that they must, to the expenses of the necessary repairs to the vessel. Both classes of expenses are extraordinary expenses consequent upon the voluntary sacrifice, and necessary for the due prosecution of her voyage by the vessel with her cargo. Neither class can, as a general proposition, be said to be incurred exclusively for the benefit of either vessel or cargo. In some cases it might be for the interest of a ship-owner to terminate the voyage at the port where his vessel puts in to repair a disaster, while it might be all important for the goods owner to have his goods carried on by the same vessel. In other cases the position of the parties in this respect might be reversed; but however this may be, the going into port, the unloading, warehousing, and reloading of the cargo, and coming out of port, are at all events parts of one act or operation, contemplated, resolved upon, or carried through for the common safety and benefit, and properly regarded to be continuous. The shipowner is at least entitled to reship the goods and prosecute his voyage with them; and the expenses necessary for that purpose being *ex hypothesi* consequent upon a damage voluntarily incurred for the general advantage, should legitimately be the subject of general average contribution, or, to use the language of Lord Tenterden in his work on Shipping: 'If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, though collateral to the reparation, should also be objects of contribution; the accessory, should follow the nature of its principal.' But it is said for the defendants, that if this be so, and the principle be carried out to its logical consequences, expenses incurred for wages of crew and provisions should equally form the subject of general average, and that, inasmuch as it is, as they suggest, undeniable that they do not, the principle itself must either be faulty or at least not recognised in English law. As a matter of fact, it is extremely doubtful whether the expenses for wages of crew or provisions in a port of refuge have ever been disallowed by our Courts as constituting a claim for general average, in a case where the ship has put into the port to repair damage itself belonging to general average; but even if the assertion were correct, the conclusion drawn would by no means follow.

"That the principle in question is not faulty we have endeavoured to show in the observations already made, and the view we have taken upon the point is strongly confirmed by the fact that it is recognised and carried to its so-called logical consequences as regards wages of crew and provisions in all other countries than our own.

"That the principle is not recognised in English law is not proved by showing that expenses incurred for wages of crew and provisions have been, under certain circumstances, disallowed as the subject of general average, unless it be shown, which it has not been to us, at the same time that they have been disallowed upon grounds that negative the principle, and it is disproved if it be found that, notwithstanding such disallowance, the expenses in question in this case have been allowed. All that in such a case can be said is, that either the Courts have made a mistake in limiting the application of the principle, or that its limitation is due to some real or supposed rule of public policy.

"If then the question before us stood only upon principle, we should have no hesitation in deciding it according to the principle we have stated, and it at least may fairly be asked, What other principle, if it be not correct, is to be substituted in its place? But

the authorities remain to be considered; and it is the more necessary that they should be examined with attention seeing that the practice of average adjusters professes to follow them."

The judgment then reviews the cases of *Plummer v. Wildman* (1815) (3 M. and S. 482), *Power v. Whitmore* (1815) (4 M. and S. 141), and *Hallett v. Wigram* (1850) (9 C.B. 580), showing that the law laid down by the Courts, for a considerable portion of the time over which the practice of average adjusters stated in the special case extended, ran counter to the practice of average adjusters; recognising, as regards port of refuge expenses, a distinction between cases where a ship puts in for repair of damage caused by a voluntary sacrifice, and cases where a ship puts in for repair of damage caused by perils of the sea, and admitting as a matter of principle, if not of express decision, expenses such as those in question in this case to be the subject of general average contribution.

After referring to Benecke, *Principles of Indemnity*, where at page 191 Benecke asserts the distinction, and also referring to Stevens on *Average* (page 22), Baily on *Average* (page 119), Phillips on *Insurance* (3rd ed. s. 1322, 6. 8), and Arnould on *Insurance* (3rd ed. vol. ii. p. 789), the judgment proceeds at page 389:—

"Neither of the already cited cases of *Power v. Whitmore* and *Hallett v. Wigram* is a direct authority against the proposition just quoted [Arnould, who does not assert the distinction] except so far as the disallowance of the expenses for wages of crew and provisions in the former case can be said to be such; for, as pointed out, the main subject of contention in those cases was the claim for expenses of repair made, notwithstanding that such repair was in each case rendered necessary in consequence of injury caused by ordinary perils of the sea, and neither the expenses of unloading, warehousing or reloading cargo, nor port or pilotage charges, came in question. The case of *Hall v. Janson* (4 E. and B., 24 L.J., Q.B. 97), decided in 1855, is on the contrary direct authority in favour of the proposition that the expense of reloading as well as of unloading cargo constitutes a claim to general average contribution, even though the original cause of putting into port was a particular average loss. There, in an action upon a policy of marine insurance, a count of the declaration states that the ship had been damaged by stormy weather, and forced to go into port for repair in order to enable her to prosecute her adventure and proceed on her voyage, and had there incurred expenses *inter alia* in and about unloading and reloading cargo which was necessarily unloaded for the repair of the ship. This count was upon demurrer held good as showing the accruing of a general average loss; and Lord Campbell C.J., in delivering the considered judgment of the Court in the Queen's Bench upon the point, said: 'Now the expenses necessarily incurred in unloading and reloading the cargo for the purpose of repairing the ship that she may be capable of proceeding on the voyage have been held to give a claim to general average contribution; for the acts which occasioned these expenses became necessary from perils insured against, and they are deliberately done for the joint benefit of those who are interested in the ship, the cargo, and the freight.' And after citing the *Copenhagen* [1799] (1 C. Rob. 289), *Plummer v. Wildman*, and Stevens on *Average*, as authorities in support of the proposition, he added: 'This doctrine is quite consistent with what is laid down in *Power v. Whitmore*, and the other cases relied upon by Mr. Wilde.' It is not necessary for us to decide in the present case whether *Hall v. Janson* was rightly

decided, and whether the expenses in dispute in the present case would properly belong to general average, if the original cause of damage to the ship had only been a cause belonging to particular average. If, however, the Court of Queen's Bench in the judgment just quoted, and the several text-writers, other than Benecke, from whom we have quoted, are right in the propositions affirmed by them, and the expenses would in such a case belong to general average, it follows *a fortiori* that they would so belong when, as is the fact here, the original cause was a voluntary sacrifice, while, on the other hand, even if the proposition laid down in *Hall v. Janson*, and supported by the text-writers referred to, were too wide, there would still be left a consensus of opinion to the effect that in such a case as the present, at least the expenses in question must be treated as constituting a claim to general average contribution. In either case the practice of the average adjusters, as stated in the special case, would be erroneous." . . .

After a reference to the cases of *Job v. Langton* (1856) (7 E. and B. 779), and *Walther v. Maurojani* (1870) (L. Rep. 5 Exch. 116) as not really touching the point, the judgment proceeds:—

"The result of this review of the authorities is to confirm the opinion which, apart from authority, we entertain and have already expressed upon the question submitted to us. The practice, then, of the average adjusters, as stated in the special case, appears to us to be neither founded on true principles nor to be in accordance with the views of the text writers, and, so far as there is case authority upon the matter, it appears to us to be opposed to legal decision. It is a practice, too, which has not been, as the practice in *Stewart v. West India and Pacific S.S. Co.* [1873] (2 Asp. M.L. Cs. 32; L.R. 8 Q.B. 88) was, made a part of the contract between the parties, and therefore constitutes no impediment to our giving effect to the objections to its validity; and in deciding as we do that the judgment of the majority of the Court below was right and should be affirmed, it is satisfactory to us to know that the law as laid down in the judgment of the Court below and of this Court is placed upon a footing which is more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile and maritime communities."

BIRKLEY *v.* PRESGRAVE (1801)

EAST'S REPORTS, vol. i. p. 220.

General average defined.

An action upon promises lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern.

A verdict had been found for the plaintiff, damages £19 : 12s. subject to arbitration as to the quantum, and to the opinion of the Court as to the questions of law upon the following case:—

CASE

The ship *Argo*, the plaintiffs being her owners, on a voyage from Wisbeach to Sunderland, laden with wheat shipped by the defendant,

of which he was the sole owner, as she was entering Sunderland Harbour with a fair wind, and had just passed the lower end of the north pier, was, by the veering of the wind and a sudden and violent squall, prevented from proceeding further into the harbour, and the crew were obliged to let go the small bower anchor in order to bring her up. With the assistance of some men who came to her for that purpose in a pilot boat, they fastened the ship, in order to secure and preserve her and the cargo from the storm, and with a warp which they for that purpose got run out and fastened to the South Pier ; but the warp was soon broke by the storm. In order that the anchor might hold, and for the preservation of the ship and cargo, more cable was then borne away and the ship was permitted to drive alongside the North Pier, to which they made her fast with hawser ends and towing lines, which were proper ropes, and such as were usually provided and employed for that purpose. The Master cut the cable from the best bower anchor that was then upon the ship's bow, being afraid that another ship would be adrift and come down upon the *Argo*, and being apprehensive that there would not be time enough to undo that cable if the other vessel should happen to drive against his ship, and therewith fastened and moored the *Argo* to the pier ; and this he did for the preservation of the ship and cargo. Whilst they were so fastening her with the cable, the other ropes (the hawser ends and towing lines), through the violence of the storm and by another ship driving against the *Argo*, broke ; and if there had been another minute's delay in cutting the cable, the ship would have gone adrift and sunk upon the bar at the entrance into the harbour ; but she avoided that peril by means of the cutting and using that cable in the manner aforesaid. Afterwards the Master, for fear the ship should make water and the corn be thereby spoiled, the ship having a hole through her bottom, occasioned by another ship running foul of her in the storm, got twelve men to go on board to keep her clear of water, in order that the cargo should not be damaged or spoiled. Half a guinea apiece was paid by the Master for the plaintiffs to those men who went on board for this purpose, they refusing to do so under that sum ; and whilst they continued in the ship they were for that purpose employed at the pumps. The damages found by the jury were calculated as the amount of what was payable to the plaintiffs by the defendant, as the owner of the cargo, in respect of the cutting and wear of the cable, the breaking of the warp, hawsers and towing ropes, and of the amount of what was paid by the plaintiffs for the services aforesaid to the men who went on board the ship, and of the expense of maintaining them whilst in the ship. The question for the opinion of the Court was, whether an action can be maintained for the loss, damage, and expenses above mentioned, or any, and which of them ?

In argument for the plaintiffs two questions were put : (1) Whether any and which of the losses are within G/A, and (2) Whether the owner of the ship can recover a contribution from the owner of the cargo for his proportion of expense incurred for the general concern.

(1) It was admitted that the hawser ends and towing lines were not such losses as fall within general average, but that the cable was such a loss, being appropriated to a different use from what it was originally intended for, and which contributed to the preservation of the ship and cargo ; so also did the money paid to the men who went to the vessel in the pilot boat, being for the preservation of the whole concern.

(2) That the action was maintainable, such actions having been maintained and verdicts recovered without objection, and falling within the general principle of law, that where any person is bound to make contribution to another the law implies a promise that he will do so; in other words, it is a good consideration for an implied promise.

Authorities quoted for plaintiffs, *Da Costa v. Newnham* (1788) and *Beawes' Mercantile Laws*, 148.

Ditto for defendant *De Caux v. Eden* (1781), and *Beawes*, 148.

LAWRENCE J. (at page 228): "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested. Natural justice requires this. Then the only argument against this species of remedy is resolvable into this, that the plaintiff chooses to take a difficulty upon himself in proving the amount of a defendant's interest in the cargo in order to ascertain the proportion which he is bound to pay, instead of having recourse to a Court of Equity, where he can obtain proof of it more easily and thereby facilitate his remedy. But that objection does not prove that a plaintiff cannot recover in an action whenever he can make out his case without having recourse to the assistance of a Court of Equity."

Lord KENYON C.J., GROSE and LE BLANC JJ. delivered judgments to the same effect.

CROOKS v. ALLAN (1879)

QUEEN'S BENCH DIVISION, vol. v. page 38.

Ship—General average—Security for payment—Duty of ship-owner—Bill of Lading—General exemption from liability.

A shipowner, where a general average loss has occurred, may be liable to an action for damages for delivering up the cargo without taking the necessary steps for procuring an adjustment of the general average and securing its payment.

The plaintiffs shipped goods at Liverpool on board a steamer belonging to the defendants under a Bill of Lading, by which the defendants undertook to deliver the goods at the port of Montreal unto the Grand Trunk Railway, by them to be forwarded (upon the conditions before and after expressed) thence per railway to the station nearest to Toronto, etc., and among the conditions was the following: "The shipowner or Railway Co. are not to be liable for any damage to any goods which is capable of being covered by insurance, etc."

In the course of the voyage the plaintiffs' goods sustained damage which came under the heading of General Average. The ship returned to Liverpool, and the cargo was discharged and handed over by the defendants to a company to be distributed and disposed of for the benefit of the parties concerned, without giving any assistance to the bailees, the underwriters, or the persons whose goods were damaged, to get an average statement made out or taking any steps to enable the plaintiffs to recover contribution:

Held, first, that the Bill of Lading did not relieve the defendants from contribution to general average; and, secondly, that they were liable to an action by the plaintiffs for their omission to take the

necessary steps to secure an adjustment and payment of the general average.

LUSH J.—“The plaintiffs are the shippers of goods on board the *Sardinian*, a steamer belonging to the defendant company, for conveyance from Liverpool to Montreal. In the course of the voyage a fire broke out in the hold which made it necessary to scuttle the ship in order to protect the whole from destruction. The water materially damaged the plaintiffs' goods, and occasioned a general average loss. The ship returned to Liverpool; the cargo was discharged, and handed over by the defendants to the Liverpool Salvage Association, to be distributed and disposed of as might be most for the benefit of the parties concerned. The complaint against the defendants is that they refused to give any assistance to enable either the Association or the underwriters, or the persons whose goods were so damaged, to get an Average Statement made out, or to take any steps to enable the plaintiffs to recover contribution. They delivered up the cargo without taking the usual security from any of the owners of cargo, and the plaintiffs were not only without the benefit of such security, but without the means of ascertaining in what proportions the several cargo owners were liable to contribute, or even who, besides the defendants, were the contributing parties. The defendants' reason for adopting so unusual a course avowedly was because they considered the ship not liable to contribution; and they based their claim to immunity from general average on a clause in the Bill of Lading.

“By this instrument, the defendants undertake to deliver the goods at the port of Montreal (unless prevented by certain specified perils) unto the Grand Trunk Railway, by them to be forwarded ‘upon the conditions before and after expressed,’ thence per railway to the station nearest to Toronto, and at the said station delivered to the consignees at a through tonnage freight. Then follow a number of minute stipulations and exemptions, among which is the following: ‘The shipowner or railway company are not to be liable for any damage to any goods which is capable of being covered by insurance; nor for any claim notice of which is not given before the removal of the goods, nor in any case for more than the invoice or declared value of the goods whichever shall be least.’ This case is, in my opinion not distinguishable from *Schmidt v. The Royal Mail Steamship Company* [1876]. Although the words ‘fire and the consequences thereof,’ which are the words relied on in that case, are here found in the previous enumeration of perils, the words in question must like those be construed to have reference to and to qualify their liability as carriers. I adopt the words which I used in that case, and repeat that ‘the office of the Bill of Lading is to provide for the rights and liabilities of the parties in reference to the contract to carry, and is not concerned with liabilities to contribution in general average,’ and unless the contrary appears the words used must be so construed. The argument receives additional force in the present case from the fact that, in the clause in question, the carriage on board the ship and the carriage by railway are linked together. Goods may be damaged in their transit in ship or on the railway, but general average contribution can only arise in respect of damage on ship.

“It was stated by the counsel for the defendants in the course of the argument that these words were introduced in order to get over the case just referred to, and to relieve the shipowner from general average contribution. If the words fairly bore that construction,

another and a more serious question would have arisen—a question which might equally have arisen if the claim was one strictly within the meaning of this clause. The long list of excepted perils, and the much longer list of exemptions and qualifications, of which the clause in question is one, and which seem designed to exonerate the ship-owners from all liability as carriers, and to reduce them substantially to the condition of irresponsible bailees, are printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small type lines without a break sufficient to attract notice. If a shipowner wishes to introduce into his Bill of Lading so novel a clause as one exempting him from general average contribution—a clause which not only deprives the shipper of an ancient and well-understood right, but which might avoid his policy and deprive him also of recourse to the underwriter, he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. A Bill of Lading is not the contract, but only the evidence of the contract; and it does not follow that a person who accepts the Bill of Lading which the ship-owner hands him, necessarily and without regard to circumstances binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them or is not informed in the course of the shipment that the Bill of Lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms, and to require a Bill of Lading which shall express those terms. Notwithstanding the concluding sentence of these small typed thirty lines, which says, 'In accepting this Bill of Lading the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions whether written or printed,' I should have thought it right, if the stipulation in question bore the meaning contended for, to give the plaintiffs an opportunity of supplying by means of an official inquiry, information as to the circumstances under which the goods were shipped and the Bill of Lading was taken, and whether the special clauses of this remarkable document were brought to their notice or were read by them before they accepted it. It is unnecessary in the present case to ascertain these facts because the clause has not the meaning which the defendants ascribe to it, and the only question is the liability of the ship to contribute.

"The next question is whether a shipowner is bound to exercise the power he is invested with, when a general average loss has arisen, and to afford the means in his power for adjusting the average claims and liabilities, and secure their payment to the parties entitled. It seems strange that such a point has not been formally decided in this country. It has been decided in America in favour of the shipper. I am not aware that it has ever been judicially questioned here, and I can only account for the absence of direct authority by supposing that the universal practice has been accepted as proof of the obligation. It is clear that the shipowner has a lien for general average on the whole of the cargo liable to contribution, and can require before he parts with it security for its due payment. In early times the Master when he had jettisoned part of the cargo to save the whole adventure, took and rendered contribution in kind. The ordinary course now is and has been for a very long time, for the shipowner

to require before he delivers the cargo, an average bond or agreement for the payment of what shall be found due from each shipper for his proportion of the loss. He is the only person who has the power to require this security.

"The right to detain for average contribution is derived from the civil law, which also imposes on the Master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with this law and has become part of the common law of the land.

"I am therefore of opinion, first, that the Bill of Lading does not exempt the shipowner from contribution to a general average loss; and, secondly, that he is liable to this action for not having taken the necessary steps for procuring an adjustment of the general average and securing its payment. This is all which I am required to decide, and my judgment will therefore be entered for the plaintiffs with costs."

JOB *v.* LANGTON (1856)

26 L.J. Q.B., page 97.

Ship and shipping—General average—Perils of the sea—Stranding of ship—Extraordinary expenses—Benefit of ship only.

Extraordinary expenses occasioned by the fortuitous stranding of a ship cannot be made the subject of general average, unless incurred for the joint benefit of the ship and cargo. Where, therefore, a ship by perils of the sea ran ashore in a bay on the coast of Ireland, and in order to get her off the whole of the cargo was discharged, and considerable expense was incurred after the cargo was discharged, in floating her off and towing her to Liverpool for repairs:

Held, that the expenses incurred in floating the ship off and towing her to Liverpool for repairs, could not be considered to have been for the benefit of the cargo, and therefore were not the subject of general average, but were (the ship being insured) a charge on the underwriters as a particular average on the ship alone.

Case stated for the opinion of the Court.

On the 15th March 1855, the plaintiffs, who were shipowners in Liverpool and owners of the barque *Snowdon*, effected with the defendant, who is an underwriter in that port, a policy of insurance upon the barque *Snowdon*, valued at £6500, at and from Liverpool to St. John's, Newfoundland. The defendant underwrote the policy for £100. The vessel sailed from Liverpool with a general cargo on the 20th March 1855. She was a new iron ship, and in consequence, it is believed, of the compasses not having been properly adjusted, the vessel the same night ran ashore in Malahide Bay on the coast of Ireland. The vessel at low water was high and dry, and it became necessary to discharge the whole of the cargo and the ballast before she could be got off. After the cargo (with the exception of 50 tons of coals, which were left on board to stiffen the vessel) was discharged and placed in store in Dublin, the vessel was got off at considerable cost with the aid of a steam tug, and by cutting a channel for the vessel. The 50 tons of coals and the ballast were taken out of the vessel into lighters before she was floated off and immediately afterwards were reshipped. The vessel was then towed to Liverpool where she could be examined and repaired better than

at Dublin. The steam tug did no work at the ship until after the cargo was landed and the coals and ballast taken out of her.

In order not to lose the market at St. John's the cargo was transhipped at Dublin on board another vessel and forwarded to its destination. By mutual agreement the circumstance that the cargo was not kept for the *Snowdon* was not to affect the question in this case, which was to be disposed of as if the *Snowdon*, after being repaired, had carried on the cargo.

The papers had been before several average adjusters to make an apportionment of the general average expenses, but they did not agree as to the mode of adjusting the loss. Some charged the expenses incurred (after the cargo was on shore and in safety) in floating the ship and towing her into port to general average, as expenses incurred for the general benefit of the ship, cargo and freight, while others charged those expenses as particular average payable by the ship alone. Amongst adjusters a common practice has been to adopt the latter mode of stating similar losses, but some cases have occurred in which those adjusters who adopt that practice as a general rule, have considered it equitable that such expenses should be charged as general average, and where they have consequently deviated from their ordinary rule.

The plaintiffs originally claimed from the defendant the sum of £13:0:6. The defendant had paid to the plaintiffs £8:11:6 of the claim, which was the amount due on the principle that all the expenses both before and after the cargo was out of the ship belong to general average, and he disputed his liability to the balance of the claim. The Court was to be at liberty to draw any inference of fact which a jury might have drawn.

The question for the opinion of the Court was, whether the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged, were chargeable to general average or to particular average on the ship alone. . . .

The judgment of the Court (Lord Campbell C.J., Coleridge, Erle, and Crompton J.J.) was delivered by Lord CAMPBELL C.J. at page 99. "Upon the question submitted to the Court in this case, we are of opinion that the expenses incurred in getting off the ship, and taking her to Liverpool for repair, after the entire cargo was discharged and in safety, are not chargeable to general average, but are chargeable to particular average on ship alone. There is no decision on the specific point, and there is no mercantile usage stated to guide us. We must, therefore, resort to the general principles on which on this head of insurance the law rests. We begin with the definition of general average by Lawrence J. in *Birkley v. Presgrave* [1801]: 'A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the preservation of the ship and cargo, meaning 'for the joint benefit of ship and cargo.' Here it cannot be said that there was any *sacrifice*, as in case of jettison of part of the cargo or voluntary cutting away masts or sails of the ship. The stranding was fortuitous, arising directly from the perils of the sea. The expenses to constitute general average must, therefore, be brought within the second category, 'extraordinary expenses incurred for the joint benefit of ship and cargo.' They were extraordinary expenses, not to be ascribed to wear and tear, and, therefore, to be borne by the underwriters; but are they to be considered as incurred for the joint benefit of ship and cargo, so that a portion of them ought to be borne by the owner of the cargo or the underwriter

of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure till all the cargo had been discharged, confessedly constitute general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam tug and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that 'the steam tug did not work at the ship until after the cargo was landed and the coals and ballast taken out of her.' We, therefore, do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriters on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Mr. Blackburn's position that 'the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average,' would justify him in contending that these expenses do not constitute particular average; but, unfortunately for him, the expenses incurred in repairing the ship at Liverpool, according to this reasoning, would equally be general average; for the repairing of the ship was an extraordinary act, which was necessary for the arrival of the ship with her cargo at Newfoundland, and was as much for the joint benefit of ship and cargo as bringing her to Liverpool from Malahide Bay.

"Under the circumstances stated, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that the *Snowdon* should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel, and we shall give our decision as if the *Snowdon*, after being repaired, had carried the cargo to its ultimate destination. But, in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo had been unloaded, expenses voluntarily incurred by the owner of the ship to get her off, and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average, as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe. But in the present case, the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord Ellenborough in *Plummer v. Wildman* [1815], we consider it quite settled that by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot under such circumstances be made the subject of general average. We have examined all the authorities cited in the argument, but not considering that there would be any use in now further commenting upon them, we give judgment against the defendant as underwriter on the ship in respect of the sum due for the expenses in question, as particular average."

KEMP *v.* HALLIDAY (1866)

34 L.J. Q.B., 233 (13th June 1865).

Marine insurance—Total loss—General average.

If a ship is submerged in deep water with cargo on board so that it cannot be got out without raising the ship, the cost of raising is general average, to which the cargo must contribute. In such a case, in order to ascertain whether a ship is a constructive total loss, the sum to be contributed by the cargo as general average must be taken into consideration; and if, after deducting that sum, the remaining cost of raising together with the cost of repairs of the ship is less than her value when repaired, the ship is not a constructive total loss. So held per Blackburn J., Shee J. dissenting.

CASE

1. The *Chebucto*, the vessel insured belonging to the plaintiff, sailed on the 21st of October 1863 from Liverpool for Rio de Janeiro, on the voyage insured, laden with a general cargo.

2. In due prosecution of her voyage the ship met with heavy gales, and worked, strained, and leaked very much, so that it became necessary, by reason of the perils of the seas, for the safety and preservation of the cargo, ship, and crew, to cut away all forward, and to bear up for and to put into Falmouth harbour as a port of refuge, where the vessel with her cargo on board came to anchor on the 12th November 1863.

3. By reason of the premises a certain general average loss was sustained.

4. On arrival of the ship at Falmouth the master of the ship applied to Messrs. Broad & Sons, who are ship-agents in Falmouth, requesting them to act as agents for the ship, and Messrs. Broad & Sons agreed to do so.

5. On the recommendation of surveyors employed by the master, the ship was passed inside the breakwater, and was moored to the pier for the purpose of being repaired, and a portion of the cargo was discharged, the heavier portion of the cargo, however, being left in the ship. The repairs were then proceeded with, but were not completed by the 2nd of December 1863.

6. On the 2nd of December, whilst the ship was lying moored to the pier, there blew a hurricane, which caused the ship, with that part of the cargo which had not been discharged, to sink at her moorings, at a place where at low water there was a depth of 22 feet, and at high water a depth of 40 feet.

7. On the same day, namely, the 2nd of December 1863, the plaintiff was informed by a telegram sent to him by the master of the ship that she had sunk in Falmouth harbour; and on the following day a Mr. Amos, a person experienced in the surveying and repairing of ships, arrived at Falmouth with full authority from the plaintiff to investigate the whole matter, and to act for him in all matters concerning the ship as according to the best of his judgment would be best for all concerned. Mr. Amos having examined the position of the ship, and having informed himself of her prior condition, and taking into consideration the probable injuries the ship had sustained, and having formed a judgment of the cost of raising her and of further repairs, came to the conclusion that it would cost

more to raise her and repair her than she would be worth when repaired. Accordingly, on the 4th December he, on the part of the plaintiff, gave notice to Broad & Sons that the plaintiff abandoned the ship, and would not be responsible for and would have nothing to do with raising or repairing her.

8. On the 7th of December a surveyor, Mr. Thomas, by the orders of Messrs. Broad & Sons (which were given on their own responsibility and not as agents for the plaintiff), commenced raising the ship, and on the 20th of that month he succeeded in raising her with all those goods on board of her which had not been discharged before the aforesaid 2nd of December. She was subsequently removed into dock by the orders and under the superintendence of the master, who had remained at Falmouth since the arrival of the ship in that harbour, notwithstanding that Mr. Amos on his visit to Falmouth had expressly ordered the captain to have nothing to do with the ship, and at the commencement of this action she was lying at Falmouth safely moored.

9. On the 4th December, the captain, by the instruction of Amos, signed and sent by post a notice of abandonment to Davies & Co., of Liverpool, the brokers who had effected the policy of insurance, and who then held the same, and on the 9th of December Davies & Co. gave due notice of abandonment to the defendant as follows:—

“LIVERPOOL, 9th Dec. 1863.

“Messrs. Burn & Airley.

“GENTLEMEN,—On behalf of the owners of the *Chebucto* we beg to give you notice that the vessel is abandoned to you in Falmouth harbour.—Yours very truly,

D. W. DAVIES & Co.”

10. The value of the cargo which sank in the ship and which was raised in her, was when raised £1750; the value of that previously taken out was £7000. The amount of the whole freight by the charter party was £475, and upon the portion of goods sunk £237:10s., the whole net freight was £75. The questions which were left to the jury were: Whether there was a constructive total loss of the vessel, first, at the time when Mr. Amos gave notice to Broad & Sons that the plaintiff abandoned her? or, secondly, at the time she lay moored after being raised? both of which questions were answered in the affirmative. In putting these questions to the jury no account was taken of any liability on the part of the cargo or freight to contribute in a general average towards the expenses of raising the vessel, or towards the general average loss at sea; and it is to be taken as a fact that if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of the general average to be so contributed, then that there was not a constructive total loss.

11. The Court or Court of Appeal were to be at liberty to draw inferences of fact in the same way as a jury would be entitled to do.

The questions for the opinion of the Court were—

First, Whether the plaintiff is, under the above circumstances, entitled to recover on the policy against the defendant as for an absolute total loss as distinguished from a constructive total loss. And if the Court should answer the above question in the negative, then—

Secondly, Whether it was material in determining the question of

constructive total loss to take into account the liability, if any such existed, of the cargo and freight to make a general average contribution towards the expenses of raising the ship or towards the general average loss at sea.

Thirdly, Whether the notice of abandonment was given too late.

If the Court should be of opinion that the plaintiff was entitled to retain the verdict, then judgment was to be entered for the plaintiff for the amount of the verdict with costs of suit.

The case was argued (Easter Term, May 2) by E. James for the plaintiff, and Cohen (Brett with him) for the defendant.

Watkin Williams, for the plaintiff, was heard in reply.

The following authorities were referred to: *Phillips on Insurance*, ss. 1343-4, 1350-1, 1545; 2 *Arnould on Insurance*, pp. 1113, 1021, 2nd ed.; *Pezant v. National Insurance Company* (Amer.), 15 Wend. 453; *Doyle v. Dallas* (1831), 1 Moo. & R. 48; *Knight v. Faith* (1850), 15 Q.B. Rep. 649; s.c. 19 Law J. Rep. (N.S.), Q.B. 509; *Cambridge v. Anderson* (1824), 2 B. & C. 691; *Lozano v. Janson* (1859), 28 Law J. Rep. (N.S.), Q.B. 337; s.c. 2 E. & E. 160; *Reimer v. Ringrose* (1851), 6 Exch. Rep. 263; s.c. 20 Law J. Rep. (N.S.), Exch. 175; *Moss v. Smith* (1850), 9 Com. B. Rep. 94; s.c. 19 Law J. Rep. (N.S.), C.P. 225; *Castellan v. Thompson* (1863), 32 Law J. Rep. (N.S.) C.P. 79; s.c. 13 Com. B. Rep. N.S. 105.—*Cur. adv. vult.*

BLACKBURN J. (page 241): "It appears from the statement in the case that the ship *Chebucto* was insured in a valued policy in the ordinary form for £1500. She sailed with a general cargo on board, and on her voyage sustained damage such as to require repairs. Part of the damage thus incurred was such as to be the subject of general average. The ship put into Falmouth for repairs, and was moored with part of her cargo on board, the residue being on shore, and the repairs were commenced, but not completed. When in this state she was, on the 2nd of December, sunk by a peril of the sea, and lay submerged with the portion of the cargo on board. Whilst she lay so submerged the agent of the assured, Mr. Amos, came to the conclusion (as is stated in paragraph 7 of the case) that to raise and repair the ship would cost more than she was worth. The ship's agents, Messrs. Broad & Sons, were of a different opinion, and acting on their own responsibility, and not as agents of the assured, they did, in fact, raise the ship with the portion of cargo on board. On the 9th of December, after Broad & Sons had commenced raising the ship, but before that operation was completed, the assured gave notice of abandonment. The plaintiffs claimed as for a total loss; the underwriters paid money into Court as for a partial loss, and it appears to have been agreed between the parties that the payment was sufficient unless the loss was total. It appears also to have been agreed between them, that if the fact that there would be a claim for contribution against the cargo on board the submerged vessel, which cargo would be raised by the same operation as raised the hull, and which would be saved along with the hull, was to be taken into account, there was no total loss. And it seems also to have been agreed between the parties, that if the fact that part of the sea damage which necessitated the repairs was the subject of general average was to be taken into account, there was no total loss. But it seems to have been contended by the underwriters, that even if both these facts were to be discarded as immaterial, the circumstances were not such as to constitute what is called a constructive total loss.

"The arrangement made at the trial appears to have been that the

opinion of the jury should be taken on this disputed question of fact, and that, subject to their finding, the case should be reserved for the Court. The case is by no means clearly stated; but I think that what I have stated above is the effect of the statement in paragraph 10, that the learned Judge left to the jury the question whether there was a constructive total loss at the time when the vessel was submerged, and the assured's agent determined not to raise her, or, after she was raised, and the jury found both of these questions in favour of the plaintiff; but in putting these questions to the jury no account was taken of any liability on the part of the cargo or freight to contribute in general average towards the expenses of raising the vessel or towards the general average loss at sea; and it is to be taken as a fact that if such liability for either loss ought to have been taken into calculation, and the estimate of the cost of raising and repairing ought to have been reduced by the amount of general average to be so contributed, then that there was not a constructive total loss.

"Some questions are raised as to the effect of the lateness of the notice of abandonment, on which I think it unnecessary to come to any determination, as I come to the conclusion that on this statement there never was such a state of things as could amount to a total loss, whatever notice of abandonment was given. In coming to this conclusion I do not regard the general average incurred at sea, but proceed entirely on the ground that, as I understand the statement in the case, the cost of raising the submerged ship and cargo, though it would have been excessive, having regard to the value of the unrepairs ship alone, was reasonable, having regard to the value of the ship, and cargo, and freight, which were jointly saved by this expenditure from a common jeopardy.

"The case contains a statement of the value of the submerged cargo, which in fact was raised by the same operation as raised the hull; but as it states neither the value of the hull itself nor the cost of raising it, this statement is valueless; but I will suppose a state of figures, to illustrate what I understand to be meant by the statement in the case. Let us suppose that the expense of raising the ship with the portion of her cargo on board to have been £600, that the further repairs necessary would be £700, that the value of the ship when repaired would be £1200, and that the value of the portion of the cargo raised and saved along with the ship is £1500. I leave out the freight which would only complicate the statement without altering the principle. Now, inasmuch as the value of the portion of cargo saved is on these figures three times the value of the unrepairs hull, and the two were saved by the expenditure of £600, if that £600 is to be charged as general average against the ship and the portion of cargo saved, £150 would be chargeable to the ship, and £450 against the portion of cargo saved by this expenditure. Now it is plain that on this state of figures, if the fact that cargo was on board is disregarded, there was a total loss; for in that view a ship worth £1200 would cost £600 to raise her, and £700 to repair her, together £1300, which is more than she is worth; but if the fact that cargo is there, which would be saved and contribute to the expenses of raising, is taken into account, there is no total loss, for it would then stand that a ship worth £1200 and a cargo worth £1500, together £2700, would be saved by the expenditure of £1300, of which £450 would be separately chargeable to the cargo, and £800 separately chargeable to the ship. Whether, therefore, the ship

and cargo were considered together or separately, they would be well worth the expenditure required to rescue them from loss. It is on construing the statement in the case, as submitting one similar in principle to that which would arise on the figures here given, that I have come to the conclusion that the defendant is entitled to judgment; and after having carefully considered my brother Shee's reasons for the opposite opinion, I still think so for the following reasons:—

“It is first necessary to consider whether, if the shipowners had in this case raised the ship and cargo as Messrs. Broad & Son did, they would have been entitled to charge that expense as general average against the portion of cargo raised by its expenditure as well as against the hull.

“In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy; but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true, that so long as the expenditure by the shipowner is merely such as he should incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average; but the expenditure in raising a submerged vessel with cargo is extraordinary expenditure, and is, if incurred to save the cargo as well as the ship (which *prima facie* is the object of such an expenditure), chargeable against all subjects in jeopardy saved by this expenditure.

“In the last edition of *Arnould on Insurance*, vol. ii. pp. 931-2, section 340, it is said, ‘A stranded vessel is, in most cases, in danger of being lost, unless speedy steps are taken for her preservation, either by unloading the cargo to lighten her, or by endeavouring to float her by means of buoys, etc., with the cargo in her. The remuneration which the shipowner is obliged to pay for the services thus rendered gives a claim to general average contribution, provided such services shall appear to have been incurred for the joint benefit of the ship and cargo, which will be the case if ship and cargo are both exposed to a common danger, and both saved from it by the exertions employed for their rescue’; this, I apprehend, is a perfectly accurate statement of the law.

“In the present case the greater part of the cargo was on shore and safe before the ship was submerged, but the extraordinary expenditure necessary to save the ship and the portion of the cargo on board would have been chargeable as general average as against them, though not as against the part that was safe—see *Moran v. Jones* [1857]. I do not mean to say that, in every case where a ship with cargo is submerged, and the two are, in fact, raised together by one operation, the expenditure incurred must necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so; and if the cargo could be easily and cheaply taken out of the ship, and saved by itself, it would not be proper to charge it with any portion of the joint operation which, in that case, would not be incurred for the preservation of the cargo. But it must be rather an exceptional case in which, where a vessel lies under 20 feet of water at low tide, the cargo can be easily, or indeed at all, taken out of the hold without either raising the ship with the

cargo, or destroying the hull for the purpose of getting the cargo out. If the contention of the assured at the trial had been that such an exceptional course was, in this case, practical and the proper one, the question would have been left to the jury, or the facts agreed upon, so that we might draw the proper inference of fact from them. Instead of doing so, the only fact bearing on this question stated is that Messrs. Broad & Sons did, in fact, raise the ship with the cargo on board. As they could have no interest, except to save the imperilled subjects in the proper way, so that they might be entitled to charge their outlay against them as salvage, I think the inference to be drawn from this fact is, that the mode adopted was the proper one, and I should, if necessary, draw that inference. But I think, from the way the case is stated, that it appears to have been agreed between the parties, that the expense of raising the ship and cargo was, in fact, general average, and as such, chargeable, in fact, on the cargo, if in law it could be so.

"I shall now proceed to consider the question, whether the circumstance that the expense of raising the ship and cargo would be partly borne by the cargo, ought to have been taken into consideration in determining whether there was what is commonly called a constructive total loss. A contract of marine insurance is a contract to indemnify against loss by certain perils; and if the subject-matter of insurance is totally lost in consequence of those perils, the assured is entitled to recover as for a total loss: if it is only partially lost, the assured is only entitled to recover for a partial loss.

"It frequently happens that by the perils insured against, the subject-matter of the insurance is so far damaged that it cannot be preserved without outlay on repairs or other ways, but may be preserved by such outlay; or that it is by perils insured against taken out of the possession of the assured, but that they can recover the possession by exertions and expenditure; or it may be, as in the present case, that both facts exist, the subject-matter is taken out of the possession of the assured, and sunk in a damaged state, but can by expenditure be raised, and then by further expenditure be repaired. In all such cases the assured may, if he pleases, elect to incur the expenditure, and save the subject-matter, and in that case it will be a partial loss only, or he may offer to abandon the whole to the underwriters, and, if they accept the abandonment, it will be a total loss, the underwriters being subrogated for the assured, and entitled to all salvage and every other right of the assured. Or, lastly, the circumstances may be such that though the underwriters refuse to accept the abandonment, the assured may elect to treat it as a total loss, and force them to indemnify him for it as such; in which case, on principles of equity not confined to marine insurance, they are subrogated for him whom they have indemnified, and have all his rights—*Randal v. Cockran* [1748], *Yates v. Whyte* [1838].

"If it were possible to work out the insurance so as to make it in practice a perfect indemnity, it would be the same thing in the pecuniary result whether the assured repaired or abandoned the subject-matter; but it is not possible so to work it out, and, in general, it is for the benefit of the assured to treat a loss as total, and this is peculiarly the case where the policy is a valued one. It therefore becomes a very important subject of inquiry, under what circumstances the assured has a right, against the will of the insurers, to treat the loss as total. Up to the present time I believe there is no difference in the principles on which the law of insurance is ad-

ministered in this and foreign countries ; and the decisions of foreign jurists are entitled to great weight. Many of those authorities cited by my brother Shee are authorities in support of positions I have laid down. I do not think it necessary to examine or cite them at length, as those principles are not now in controversy between us. But on the part of the case which I am proceeding to argue, there is a fundamental difference between the law of insurance as administered in America and as administered in England.

"In America, if the subject-matter of insurance sustain damage to the extent beyond 50 per cent, the assured may abandon and recover for a total loss. This is an implied part of the American contract, and, unless there be something expressed which excludes this implication, the assured has the right ; and that right depends on the state of things when the abandonment was given, and is not altered by any subsequent change in the state of things. But this is not the English law. In *2 Phillips on Insurance*, sect. 1536, it is said, 'This rule of abandonment, on account of loss over 50 per cent of the value of the subject, makes the most material difference between the American and the English jurisprudence relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. It extends equally to ship, cargo, and freight. This rule and that rule in the United States whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in England, give a wider range to the constructive total loss and abandonment in the United States, and consequently an increased liability of underwriters for loss by the agents who have charge of the insured subject.' I do not think that any American cases, based on principles so different from ours, are authorities in an English case. I shall, therefore, with great deference to my brother Shee, who relies upon several cases in the United States, refrain from examining them, and rely only on the English decisions.

"It is now finally settled in England by the decision of the House of Lords in *Irving v. Manning* [1847], 'that the question of loss, whether total or not, is to be determined just as if there was no policy at all.' If the subject-matter is by the underwriter's perils put in such a situation that, supposing there was no policy, it would be totally lost to its owner, then as between the assured and the underwriter there is a total loss, not otherwise. And the question whether the thing is lost to the owner is to be treated in a practical business-like spirit, and if the owners cannot by any means which they or their representative, the captain, can reasonably use be saved, then it is totally lost; but if by any reasonable means which were reasonably within their reach they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owners to take those reasonable means. If they do not take those means 'they cannot make the loss total by their own neglect.' *Thornely v. Hebson* [1819], as explained by Lord Tenterden in *Perry v. Aberdeen* [1829]. 'The duty of the master in case of damage to the ship is to do all that can be done towards bringing the adventure to a successful termination, to repair the ship, if there be a reasonable prospect of doing so at an expense not ruinous, and to bring home the cargo and earn the freight if possible,' *Benson v. Chapman* [1849]. The underwriters do not by their contract engage to indemnify

against the consequences of his neglect to perform that duty. The question, however, whether it is possible, must be understood in the sense in which it is explained by Maule J. in *Moss v. Smith* [1845]: 'In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it may be possible by some very expensive contrivance to recover it.' I may add, to complete the illustration, that a diamond of great value would not be totally lost if dropped into water from whence it would cost £10 to recover it, though a shilling in the same position would be totally lost.

"When a ship or other subject-matter of insurance is in such a situation that it can be saved, but only by an excessive expenditure, the assured may undoubtedly (at least if they give notice of abandonment in due time) treat it as a total loss and recover for it as such. In *Knight v. Faith* [1850] Lord Campbell expressed a strong opinion that it was essential that there should be a notice, and that the owner of the shilling at the bottom of the well could not, without what would in his case be an idle ceremony, recover as for a total loss. If it were necessary for the decision in this case to determine that point, my doubt would be, whether I was not bound in a Court below to follow that as the latest decision, and to reserve for a Court of Error the question whether he was right in that opinion; but it is unnecessary to come to any determination on this point, for all the English authorities agree that unless the circumstances are such as to make the loss total within the principle expounded by Maule J., in *Moss v. Smith*, no notice of abandonment can make it so, and also that even if the circumstances were such that at the time the notice of abandonment was given it was justified, yet if by subsequent events before an action brought, the plaintiff might by reasonable means obtain the thing, he can only recover for a partial loss. As was stated by Holroyd J., in *Brotherston v. Barber* [1816], 'Abandonment has its origin from being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss; which is inconsistent with a contract of indemnity.' . . . 'As events have made it at the time when the action was brought, it is but a partial loss.' See also *Naylor v. Taylor* [1829].

"The question, whether it is practicable to save the subject-matter within the meaning of the phrase as explained by Maule J., in *Moss v. Smith*, has been differently left to the jury. In *Gardner v. Salvador* [1831], Bayley J. left it to the jury to say whether 'by means within the reach of the captain which he could reasonably use,' the ship could be saved. The mode of putting the question generally adopted has been to ask 'whether a prudent uninsured owner would have done it.' In *Rossetto v. Gurney* [1851], the Court, approving of what had been said by Maule J. in *Moss v. Smith*, state the rule thus: 'If the damage is repairable the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore as between the underwriters and the assured impossible.' The three modes of expression all seem to me to convey the same idea. No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them. But if

the means within his reach would cost less than the object is worth, a prudent uninsured owner would adopt them rather than suffer the thing to perish, though a prudent insured owner, especially if insured in a valued policy, would probably act otherwise, if the law permitted him by so doing to recover from the underwriters for a total loss.

"I should observe that I think, in the present case, the question whether there was a total loss at the time when the ship lay submerged, and that whether there was a total loss when she lay moored at Falmouth in the custody of Messrs. Broad & Sons, are identically the same. Whilst the ship lay submerged, it was a question of calculation what the cost of raising her would be; but before the trial Messrs. Broad & Sons had by experiment ascertained what it was, and the assured could have got their ship by adopting their act, and paying them for what they had done; and then the assured would have been exactly in the same position as if they had themselves originally raised her.

"In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay, ought to be taken into account; and, amongst these, the fact that cargo would be saved by the operation, and would contribute to the expense, seems to me a very important element.

"The shipowner is not asked to advance money for the benefit of strangers on the security of their property; he is the authorized agent of the owners of the cargo, having the custody of it, and bound to save it if he can. It was contended on the argument that in considering whether the subject-matter of insurance was totally lost, we were bound to look to it, and to it alone; so that in the conceivable case of a ship, worth say £1500, being in peril, with cargo on board also worth £1500, which could be saved together by the expenditure of £2000 on one operation, the assured was entitled to consider both as totally lost, because neither singly was worth the sum which would save the two. If a long series of decisions had established this, we could not help it; but in truth from the time of Lord Mansfield it has been an established rule in assurance law that: 'If the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss'—*Hamilton v. Mendes* [1761]; and the only case in which a point like this was ever attempted to be set up was *Moss v. Smith*. In that case the attempt totally failed. Maule J. explained the law in a manner to be perfectly satisfactory, and what I have written is in truth but an attempt to adapt his reasoning to the present case. Lord Truro, in the same case, said, 'We are asked, Would any man in his senses spend £1000 on the repair of a ship for the mere purpose of earning £500 freight? To this I answer, Certainly not. But this is not the true question. If by expending £1000 on repairs he gets not only £500, but also a ship worth £3000, who will for a moment question the prudence of the outlay?' This is an authority, as it seems to me, precisely in point, and agreeing with it as I do in principle, I think our judgment should be for the defendant.

"I need hardly say that I should not adhere to this opinion against that of my brother Shee, unless on consideration I entertained it decidedly; but I should regret much if my decision were to be final. That, however, is fortunately not so.

"This Court being equally divided, there would be no judgment unless one of the judges withdrew his opinion in order that the case might go into error. It is the practice for the junior Judge in such a case to withdraw his judgment, and owing to the accident of my brother Shee being junior to myself, the judgment will be entered for the defendant, leaving the plaintiff to appeal."

Judgment for the defendant (page 246).

PIRIE & CO. v. MIDDLE DOCK COMPANY (1881)

ASPINALL'S MARITIME LAW CASES, vol. iv. page 388.

Shipping—General average—Damage by water to extinguish fire—Loss of freight.

Where a cargo of coals is shipped to be carried to S., and there delivered on payment of freight, and a fire breaks out spontaneously in the coals, and portions are thrown overboard, and the remainder so wetted and damaged by water poured upon them to extinguish the fire, that they have to be discharged and sold at a port of refuge, and the freight upon them is wholly lost,

The shipowner is entitled to a contribution in general average for the lost freight, and there is no claim on account of the cargo: first, because there is no loss on account of it; secondly, because the vice in it is the cause of the sacrifice.

The right to general average is not founded upon contract or the relations created by contract, but upon a rule of the common law, and upon the principle of the ancient maritime law. The facts of the case proved and admitted at the trial were as follows:

By a Charter-Party entered into on 13th May 1877 between the plaintiffs, merchants in London, and the defendants, the owners of the vessel *Attila*, it was agreed, amongst other things, that that ship should proceed to the river Tyne, and load a cargo of coal for the plaintiffs, and then proceed to Singapore or Penang as ordered, there to discharge the cargo, certain perils excepted. Freight was to be paid on the quantity delivered. A cargo of 1430 tons having been loaded at Newcastle the *Attila* sailed thence on 16th July. She was properly ventilated fore and aft, and during the voyage the hatches were taken off as often as possible. On 16th November, when inside the Straits of Sunda, seventy or eighty miles from Anjer, the captain found that smoke was coming out of the forward ventilator. On removing the main hatch he found smoke rising at three different places, and being alarmed for the safety of his ship and cargo he caused a large quantity of water to be poured down the hold. In order, if possible, to get at the seat of fire, a portion of the cargo, amounting to some 50 tons, was jettisoned. Though water was poured on the coals continuously for three days, smoke continued to rise from the hold up to the time of the arrival of the *Attila* at Batavia, which was at 5 P.M. on the 18th. On the following day the captain commenced to discharge the cargo into lighters, and on the vessel being then surveyed, the surveyors, who were appointed by the British Consul at Batavia, recommended that the vessel should be towed into the inner roadstead and the cargo at once discharged. This was done, and the fire-engine was kept constantly at work for the first half of the twenty days occupied in so discharging the coals. It was found to be utterly impossible to reship the cargo for Singapore

or Penang, and it was therefore sold at Batavia, in accordance with the recommendation of the surveyors, realising £1149 : 3 : 8. Of this sum the defendants paid to the plaintiffs £500, and offered before action brought to pay a further sum of £352 : 4s. An average statement was prepared at Batavia, but not acted upon, as by the charter-party the average had to be settled in London, according to the custom at Lloyd's. The average staters in London, employed by the defendants to prepare the statement on behalf of the underwriters of the ship and freight, claimed in general average on behalf of the shipowner the sum of £667 : 15 : 8, being one-half the estimated amount of the freight which the ship would have earned if she had carried the cargo to its destination, and they charged that amount in the statement of general average as arising from and in consequence of the damage done to the cargo by the means adopted to extinguish the fire, viz. the saturation of the cargo by water. This made a general average contribution payable by the cargo of £339 : 1 : 2. The underwriters on cargo were not satisfied with this adjustment, and the average adjusters then employed by them excluded altogether the loss of freight from the general average column. The present action was brought by the plaintiffs to recover the balance of the proceeds of the sale of the cargo at Batavia, which the defendants claimed by way of set off to retain as representing the contribution by the cargo in general average for the loss of their freight.

WATKIN WILLIAMS J. delivered a written judgment to the following effect at page 389 : "The action was brought by the plaintiffs, who are merchants in London, against the defenders, who are the owners of the ship *Attila*, to recover the net proceeds of certain cargo sold by them in a damaged state at a port of refuge. The defendants did not dispute their liability to account to the plaintiffs for the proceeds of the cargo, and they had in fact paid to the plaintiffs a large portion of the amount, but they claimed to be entitled to retain the amount now in dispute on account of a set-off or counter claim for a general average contribution from the cargo for the loss of freight under the following circumstances : On the 30th May 1877 by a charter-party, it was agreed between the defendants, the owners of the ship *Attila*, and the plaintiffs as merchants, that the vessel should load a cargo of coals in the Tyne and proceed therewith to Singapore, and there discharge the cargo, certain perils excepted, the freight to be paid on the quantity at the rate of £20 per keel, 'average claims, if any, to be settled in London according to the usage of Lloyd's.' The vessel loaded a full cargo of coals in bulk according to the charter party, and set sail on the 16th July. Nothing of importance occurred upon the voyage until the 16th November when an unusual sulphurous smell was observed coming up the ventilator forward. The hatches were taken off, and the hold was found to be full of smoke, and, on further examination, the coals were found to be on fire on the starboard side and afterpart of main hatch. The crew threw water on the spot and discharged cargo overboard to endeavour to get at the seat of the fire. The same proceeding was continued on the 17th, and on the 19th the vessel was towed into Batavia. The jettison of cargo and the pouring of water upon it continued more or less during the whole time. Both these expedients were adopted for the purpose of saving the ship and the cargo, which were in great peril of total destruction from the fire ; and the ship and a large portion of the cargo were in fact saved

by the operation. Upon the arrival at Batavia a survey was held upon the ship and cargo, and the surveyors recommended that the entire cargo should be discharged. A considerable portion of the cargo was found to have been completely charred and burnt, and the remainder so damaged by the saturation with water, that it was practically impossible to forward it to its destination; and the surveyors recommended as the best course that the cargo should be all sold, and it accordingly was sold and realised net the sum of £1149 : 3 : 8. This was, in fact, the best and only practicable course to be adopted.

"It must be taken as a fact that a certain portion of the coal was entirely destroyed, also that the fire was not general, but confined to a particular part, that the ship and whole adventure was in imminent peril of being destroyed by fire, and that the jettison of a portion of the cargo and the saturation of other portion saved the ship and a large portion of the cargo from destruction, and that the adventure came to an end at Batavia under the circumstances above described.

"It was admitted by the counsel on both sides that the whole of the freight—that of the cargo which was destroyed by fire and that which was jettisoned, as well as that of the cargo which was saved, but which was too much damaged to be forwarded to its destination—was totally lost. Under these circumstances the plaintiffs, the merchants, claim to be entitled to the net proceeds of the cargo, and the defendants, not disputing the plaintiffs' general right to receive such proceeds, claim the right to deduct therefrom a contribution in general average towards the lost freight of so much of the saved cargo as was damaged by water, but excluding that damaged by fire.

"Two average statements were prepared: one by Messrs. Davison, Son, & Lindley, on behalf of the shipowners, and another by Messrs. Manley Hopkins & Son, on behalf of the merchants, each professedly made up according to the usage of Lloyd's in London. Each of these statements treated the case as one giving rise to claims for general average. The values of the saved ship and cargo were inserted as contributories towards the general average claims, and amongst the claims for contribution were inserted the value of the jettisoned cargo, the towage of the ship into Batavia, the expense of discharging the cargo, and a number of other items usual in such cases. Each of the average staters also included in their statement the cargo itself, as an interest entitled to claim contribution; but both concurred in not carrying forward any actual claim upon the ground that, for the reason presently stated, there was no loss. The reason was as follows: The cargo realised at Batavia net the sum of £1149 : 3 : 8, after payment of all charges and expenses, not, of course, including freight, because *ex hypothesi* no freight was due. If the cargo had reached its destination it would have sold for £2151 : 17 : 3, but the charges including freight would have amounted to £1335 : 11 : 4, leaving a net balance of only £816 : 5 : 11, on which account both the average staters treated the case as one of no loss upon cargo. Up to this point both average staters agree, and there is no reason to doubt that so far the statements are in accordance with the usage at Lloyd's.

"We now come to the disputed item: Messrs. Davison, Son, & Lindley inserted amongst the claims for contribution in the general average column the sum of £667 : 15 : 8, on account of the freight

of the cargo damaged exclusively by water, and in consequence sold at Batavia. Messrs. Manley Hopkins & Son excluded altogether the loss of freight from the general average column.

"After referring to the contentions of the merchants and shipowners as dealt with by their counsel, the judgment continues :

"Mr. Lindley, who was called as a witness for the owners, stated that he had never known a similar case in his experience, and, so far as he was aware, there was no usage of Lloyd's applicable to the case.

"I have, therefore, to determine the question according to general principles of law. In my judgment the shipowners are entitled, under the above circumstances, to a contribution in the general average for the loss of the freight in respect of which they make their claim, for the following reasons :—

"It is material to bear in mind that the claim in this case is not one made by the owner of destroyed cargo against the shipowner, and resisted by the latter upon the ground either that the cargo was in fault, or that there was no real sacrifice by reason of the cargo having been already inevitably lost, but a claim by the shipowner to be entitled as against the merchant whose goods had been saved, to bring into the general average the freight alleged to have been sacrificed by an operation which saved the ship and a large part of the cargo, and at the same time caused the total loss of the freight.

"This may also be a convenient place to mention that the lost freight if it becomes a subject of contribution in the general average, bears its own share of the loss with the other contributing interests.

"It seems to me that the only question in the case is whether the operation of pouring the water upon the coals under the above circumstances, and so rendering them unfit to be forwarded to their destination—causing a total loss of the freight to be earned by their delivery at their destination—can be considered as a voluntary sacrifice of the freight of the coals so wetted within the true principles of general average.

"In order to solve this question it is necessary to consider what are the true principles upon which the right to a general average contribution is founded.

"This right and its correlative obligation are not founded upon any contract, nor do they arise out of any relation created by contract between the parties : they spring from a rule of law applicable to all persons who chance to have interests on board of a ship at sea exposed to some common danger threatening the safety of the whole. It is a law founded upon justice, public policy, and convenience, and rests, as Mr. Parsons says, in his *Maritime Law*, vol. i. p. 286, upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force. It formed part of the ancient marine law of Europe. It was incorporated into the Roman civil law from the code of Rhodes. This ancient code, which was the prevailing law at least a thousand years before the Christian era, is probably all lost with the exception of this one article, which is preserved in the *Digest* in the form of a rubric in the following terms : 'De lege Rhodia de jactu. Lege Rhodia cavetur ut, si levandae navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.' Concerning the Rhodian law of jettison. By the Rhodian law care is taken that, if for the sake of lightening the ship a jettison of merchandise is made, that which is given for all shall be made good by a contribution of all.' This, says Parsons (*Maritime Law*, p. 286), is the foundation of the

law of general average, and all besides this consists only of the rules which have been devised to carry this principle into its proper effect in the great variety of cases, and through the many consequences which belong to its application. This principle of law must, in my judgment, be regarded as incorporated in and forming part of the unwritten common law of England. The principle is thus laid down by Malyne in the *Lex Mercatoria*, published in 1656, and Molloy in his work, *De Jure Maritimo*, published in 1744: 'Ships being freighted at sea are often subject to storms and other accidents, in which, by the ancient laws and customs of the sea, in extreme necessity the goods, wares, guns, and whatsoever else shall be thought fit, may in such extremity be flung overboard. The ship arriving in safety, the remainder must come into the average, not only those goods which pay freight, but all those which have obtained safety and preservation by such ejection, even money, jewels, and such like are not exempted.' And Molloy goes on to say that, 'King William the Conqueror and Henry I. ratified this law concerning goods cast overboard by mariners in a storm in imitation of the ancient Rhodian law "de Jactu."' This is also confirmed by Bracton, lib. 2, fol. 41, b. n. 3; also by Selden in his work, *De Dominio Maris*, chap. xxiv. p. 482. It is further confirmed by a statement in *1 Rymer Foedera*, 3rd ed. p. 240, that Edward I. in 1285 sent to the Cinque Ports letters patent, declaring what goods were liable to contribution; yet this law does not appear in any statute or written ordinance of English law. Emerigon, in his famous treatise published in 1783, in writing upon this subject, says: 'The ancient laws of the sea are the sources whence those should draw who wish to recur to principles. These include rules so much the more sure that they are derived from the nature of things, and these rules form a part of the Law of Nations. They belong, consequently, to every age and every country.' I consider, therefore, that, in solving the present question, which is stated never to have been before decided, I am bound to resort to the principles of maritime law as expressed in the maxim from the code of Rhodes, and as expounded in the various works of authority upon the subject.

"Let us see what are the contentions put forward in the present case on the part of the merchants who resist the claim to the general average.

"First, it is said that the act of destruction of cargo and the consequent loss of freight was not a general average operation at all, because it was brought about or rendered necessary by the spontaneous combustion and inherent vice of the cargo itself, and was therefore a particular average, and not a general average act, and for this the judgment of Willes J. in *Johnson v. Chapman* [1865] was cited. In that case cotton had been shipped in a damp state, and in consequence, and without external accident, burst into a flame and was on that account thrown overboard, and it was held that the merchant had no claim to contribution on account of the jettison. The application of the principle of that case to the present involves a complete fallacy. All that that case decides is that if the owner of the interest sacrificed was himself in fault, and was the cause of the danger which necessitated the sacrifice, he must bear the loss himself, and could not throw it as a general average on the whole adventure, or, as it has been expressed in one of the decisions, he cannot take advantage of his own wrong. This is strictly in accordance with the maritime law, and has been laid down in several previous decisions. See the

cases of *Worms v. Storey* [1855] (11 Exch. 427), *Schloss v. Heriot* [1863] (1 Mar. L.C. O.S. 335; 8 L.T. Rep. N.S. 246; 14 C.B. N.S. 59), the *Norway* [1864] (2 Mar. L.C. O.S. 168, 254; 13 L.T. Rep. N.S. 50; *Brown and Lush*, 377), *Robinson v. Price* [1876] (13 Asp. Mar. L.C. 321, 407; 36 L.T. Rep. N.S. 354; L. Rep. 2 Q.B. Div. 91). In truth, if the principle of *Johnson v. Chapman* [1865] has any application to the present question it is entirely opposed to the contention of the merchant, because he is endeavouring through the fault of the cargo to escape from the claim of the shipowner, who was not in fault, to a contribution on the loss of his freight.

“The next contention on the part of the merchants was that this was not a case of general average, because there was in fact no sacrifice of cargo and its incidental freight, inasmuch as the cargo having taken fire was practically already lost past redemption, and the sacrifice was committed, not for the safety of the adventure, but for the sole benefit of the cargo and to lessen its destruction; and for this proposition was cited the great authority of Mr. Benecke, and also the practice and custom of British average adjusters, as found in the case of *Stewart v. The West India and Pacific S.S. Co.* [1872] (27 L.T. Rep. N.S. 820; 8 L. Rep. Q.B. 88). Benecke says: ‘If the Master’s situation were such that but for the voluntary destruction of a part of a vessel or furniture, the whole would certainly unavoidably have been lost, he could not claim a restitution, because a thing cannot be said to have been sacrificed which had already ceased to be of any value.’ Again, Baily on *General Average* (2nd ed. p. 40), in referring to this rule of the average stater, says: ‘Damage done to cargo by pouring water down upon it, in order to extinguish a fire which has not touched the goods, is excluded from general average.’ The contention in support of the disallowance is, that it is a moral certainty that the fire would consume the cargo if it be not extinguished by throwing water on the cargo, and so the cargo is in no worse position although the rest of the adventure be saved by the operation. Mr. Baily, in the work referred to (pp. 81, 82), in expressing his dissent from this practice says: ‘In defence of this practice no solid reason can be urged; it is based on an erroneous idea that a general average cannot arise when the degree of danger is so great that it amounts to a moral certainty of total loss, and on a fanciful distinction between the degree of danger existing in the case of fire and the degree existing when a vessel is on her beam ends or on the point of foundering—a distinction which the ingenuity of argument may draw, but which will not bear the test of common sense.’ Parsons, in his work on *Insurance* (vol. ii. p. 287), in commenting on the above passage in Benecke, says: ‘We cannot think that this passage in Benecke rests upon any good reason, and if applied in the terms in which he expresses it, it would exclude nearly all the cases which are regarded both in law and in practice as general average ones. Indeed, these cases may be generally described as cases in which ship and cargo are exposed to a common peril, by which the whole would be certainly and unavoidably lost unless a part be sacrificed to save the rest, and this sacrifice being made, the residue or a part of it is saved.’

“There can be no doubt that, according to the universally accepted principles of general average, the following conditions must concur in order to give rise to a claim for contribution: 1. There must be a common danger. 2. There must be a necessity for the sacrifice. 3. The sacrifice must be voluntary. 4. It must be a real sacrifice,

and not a mere destruction or casting off of that which had already become lost and consequently of no value. 5. There must be a saving of the imperilled property through the sacrifice.

"The question in a case like the present arises from the necessity of drawing the line, marking the logical distinction between the necessity for the sacrifice on the one side, and the hopelessness of saving the sacrificed property on the other.

"Emerigon says, chap. xii. s. 29: 'It is not enough that a jettison has been made; that measure must have been forced on those resorting to it by the fear of perishing, and a panic terror will not excuse the captain who has had recourse to jettison without being forced to it by real danger.' On the other hand, in a case in the American Courts (*Crockett v. Dodge*, 3 Fair. 190), a vessel laden with lime was hauled out into the stream and scuttled because the lime was on fire. The lime was destroyed at once, and the ship was saved, but it was held that the ship did not contribute for the lime, because the lime could not possibly be preserved, and the ship was saved by only hastening its destruction. It has been decided in America in the case of *Nelson v. Belmont* (5 Duer. 310), and in the case of *Nimick v. Holmes* (25 Pennsyl. 366), that where a cargo is on fire, and water is poured down to extinguish the fire, and goods are thereby injured which the fire had not reached, they are to be contributed for. Lowrie J. in the latter case said the danger is a common one, and the cost of the remedy must be common. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water in order to save the rest. In the case of *Stewart v. West India and Pacific S.S. Co.* (sup.) in 1872, in which a quantity of bark had been injured by pouring water down the hold to extinguish an accidental fire, Cockburn C.J., and Mellor and Quain JJ., expressed their opinion that according to the common law the case was one of general average, but the parties having agreed that average was to be adjusted according to British customs, and the case finding that it was the custom at Lloyd's not to treat such a loss as one general average, the decision was necessarily against the claim. However, in a subsequent case in the year 1878 (*Achard v. Ring*, 2 Asp. Mar. Law Cas. 422; 31 L.T. Rep. N.S. 647), the existence of this custom was challenged, and, upon a trial before a special jury in London, the custom was negatived, and the principle of the common law and of the maritime law as recognised by all commercial nations, was applied to the case, and the plaintiffs recovered a contribution in general average for damage done to their goods by the scuttling of the ship to extinguish a fire; and since that time this custom and practice has been discontinued and finally abandoned at Lloyd's. The still more recent case of *Attwood v. Sellar* [1880] (4 Asp. M.L. cs. 153; 41 L.T. Rep. N.S. 83; 4 Q.B. Div. 342) dealt a further blow to the supposed British customs and usages which were said to differ and distinguish the law of general average in England from that universally accepted; and it may now be considered as fairly established that this important branch of our commercial law is governed by the principles of the common law of England, embracing within it the principles of the general maritime law.

"Applying these principles to the facts of this case, I find that the ship and the whole adventure were in imminent danger of destruction from the fire which had broken out in one part of the cargo of coals; that it was prudent and necessary to throw over a portion of the

coals to get at the seat of the fire, and to pour down water, both upon the burning coals and also upon all the rest of the coals, including those that were distant from the fire, as well as those adjoining it, for the purpose of arresting and extinguishing the fire and saving the ship and cargo; and also that all the operations were prudent and necessary with the same view, and that the water was poured down with this purpose and intention, and that the operation was successful in saving the ship and a very large portion of the cargo; and, further, that the operation involved a voluntary sacrifice for the benefit and safety of the adventure of a certain portion of the freight, viz. so much as related to cargo damaged by water, and not within the immediate reach of the fire, and which was too much damaged by water to be forwarded to its destination so as to earn freight. These conclusions upon the principles above stated, establish the claim of the owners of the freight to a contribution in general average from the owners of the other interests, and entitle the defendants to judgment."

SCHUSTER *v.* FLETCHER (1878)

QUEEN'S BENCH, vol. iii. page 418.

Ship and shipping—General average—Special charges—Remuneration to shipowner for services in transhipping and identifying cargo and arranging with consignees for sale of part unidentified—Commission on disbursements.

A ship during her voyage from India to London was stranded on the coast of France. The shipowner despatched his manager and other persons to take part in the necessary salvage operations, and the whole of the cargo was saved, transhipped, and brought forward to London and the freight earned. Part of the cargo which could not be identified was sold by the shipowner by arrangement with the consignees through a broker, who received his brokerage. The shipowner incurred considerable trouble in chartering ships to carry on the cargo from France to London, and in sending out lighters and necessary appliances to France, and in the identification of the cargo, preparing for the sale, answering the inquiries of and arranging with the consignees. In the average statement a remuneration to the shipowner for "arranging for salvage operations, receiving cargo, meeting and arranging with consignees, and receiving and paying proceeds, and generally conducting the business," was charged partly to general average and partly to particular average on the several interests rateably, the average stater thinking that the amount was a reasonable remuneration to the shipowner for his services and for commission on the sale of unidentified cargo, and on disbursements:

Held, that under the circumstances the amount was improperly charged and could not be recovered, there being no contract on the part of the owners of the cargo to remunerate the shipowner for his services, a great part of which had been rendered with the object of earning his freight.

Report by a special referee under s. 56, of the Supreme Court of Judicature Act 1873:—

1. and 2. The plaintiffs are merchants in London. The defendant is sole owner of the ship *Victoria Nyanza*.

3. In December 1873, the plaintiffs shipped on board the *Victoria*

Nyanza at Calcutta, for delivery at London under Bills of Lading, 125 chests of indigo, and the ship sailed for London, having on board a valuable cargo of indigo, tea, jute and linseed, the indigo being the most valuable portion.

4. On the 4th April 1874, the *Victoria Nyanza*, while prosecuting her voyage to London, stranded at Etaples near Boulogne.

5. The defendant was at once informed by telegraph of the disaster, and he forthwith communicated by telegraph with Messrs. G. H. Fletcher & Co. of Liverpool, a firm of which he had formerly been, but was not then, a member.

6. G. H. Fletcher & Co. at once communicated with the Liverpool Salvage Association, and obtained from that Association the services of Captain Chisholm and Captain St. Croix, two gentlemen of experience in salvage operations, who on the 5th April started for Etaples.

7. G. H. Fletcher & Co. also, on the 6th April, sent out their own manager Mr. Bromehead to the same place, and the defendant sent him a power of attorney to act for him, and opened a credit of £5000, in his favour at Boulogne to provide for expenses there. The defendant also procured the necessary pumps, tackle, and other appliances to be sent out from England for the purpose of salvage operations.

8. Under the directions of Mr. Bromehead, with the assistance of Captains Chisholm and St. Croix, a part of the cargo was taken out of the ship as she lay stranded (an operation of considerable difficulty) and sent to Boulogne. On the 25th April the ship was got off and towed into Boulogne harbour, whence she ultimately sailed to Liverpool.

9. The whole of the cargo was saved and transhipped at Boulogne, and brought forward by the defendant to London, and the freight earned.

10. The first of the cargo reached London about ten days after the stranding, and the whole by the middle of May.

11. On the 25th April 1874, an average agreement was entered into between the defendant and the several consignees of cargo. The several consignees, in accordance with that agreement, paid sums of money to the defendant, the plaintiffs paying £1212.

12. The cargo as it arrived was landed and warehoused at the London docks.

13. Some portions of the cargo proved difficult of identification by reason of the shipping marks having become obliterated. Other parts it was impossible to identify. All the goods which were identified were given up to the consignees under the terms of the average agreement. The goods which were not identified were sold by the defendant by arrangement with the consignees thereof through a broker who received his brokerage.

14. The defendant incurred considerable trouble in chartering ships to carry on the cargo from Boulogne to London, and in sending out lighters and necessary appliances to Boulogne, and in the identification of so much of the cargo as was identified, and in the endeavour to identify the residue, and in ascertaining and answering the inquiries of and arranging with the consignees, and in preparing for the sale of and selling the unidentified cargo and distributing the proceeds.

15. Mr. Elmslie, of the firm of Elmslie & Son, the average staters, mentioned in the average agreement hereinbefore mentioned, prepared an average statement dated 16th November 1875.

16. In that statement, all disbursements by the defendant are included, and duly distributed among the several interests, including charges for the services of Captain Chisholm and Captain St. Croix, and of the Liverpool Salvage Association, and of Mr. Bromehead, and the accounts paid to the Dock Company.

17. The statement also includes a charge as follows: G. H. Fletcher & Co., agency, arranging for salvage operations, receiving cargo, meeting and arranging with consignees, receiving and paying proceeds, and generally conducting the business, £2500. This charge the plaintiffs object to, and seek to recover back their proportion thereof.

18. The sum of £2500 does not represent any sum which the defendant has paid or rendered himself liable to pay to G. H. Fletcher & Co. It was arrived at and distributed in the following manner:—Mr. Elmslie formed the opinion, upon all the circumstances of the case, that £2500 was a reasonable remuneration to the defendant as shipowner, in respect of his services hereinbefore mentioned, and in respect of his advances for disbursements. And he proceeded to distribute that sum as follows. He took thereout a sum amounting to 2½ per cent on the proceeds of the unidentified goods sold, and debited this to cargo in the cargo column. He took thereout further a sum amounting to 2½ per cent upon the total disbursements, and this he debited to the several interests rateably in their respective columns. The balance of the £2500 he debited to general average, in the general average column.

19. The effect is, that the sum of £2500 thus distributed is made up of three heads of charge:

- (1) A commission on the sale of unidentified cargo.
- (2) A commission on disbursements.
- (3) A charge by way of remuneration for trouble in respect of matters mentioned in paragraph 14.

20. There was no contract on the part of the consignees, or any of them, to pay the defendant the remuneration claimed, or any part thereof, under any of the heads above mentioned, unless such a contract is to be found in the average agreement above mentioned.

21. No custom has been proved, entitling a shipowner under such circumstances to any remuneration under any of those heads. But a charge for remuneration by shipowner in respect of his trouble and labour in such cases has for the last few years been often inserted in average statements and with increasing frequency. The charge has often been allowed, and sometimes resisted by underwriters.

22. When unidentified goods have to be sold, and the sale is managed not by the shipowner himself, but by the ship broker or some third person, a commission to such person (in addition to the selling broker's brokerage) is charged and allowed.

23. Where money for disbursements upon salvage of cargo is provided, not by cargo owner or shipowner, but by some third person, commission upon such disbursements is charged and allowed.

24. Where in case of wreck the shipowner abandons the voyage, and the Salvage Association of London, Liverpool or elsewhere intervenes and salves the cargo, a sum by way of remuneration under the name of office charges in addition to disbursements analogous to the third head of charge in the present case, is always charged and allowed to the Association.

25. With reference to the first head of claim. If the defendant is entitled in point of law to charge a commission on the sale of un-

identified goods, the commission of 2½ per cent charged being an ordinary merchant's commission is not an unreasonable commission to charge.

26. With reference to the second head of charge, the defendant was never out of pocket throughout the transactions hereinbefore mentioned to any large amount or for any considerable length of time, and unless he be entitled by reason of any general rule to charge a commission on disbursements, there are no special circumstances in the present case making it reasonable to do so in this instance.

27. With reference to the third head of charge, if the defendant is entitled in point of law to remuneration for his trouble in and about the matters hereinbefore mentioned, a sum of £200 is a reasonable remuneration in respect thereof.

The agreement was annexed to the case. It was between the defendant and the plaintiffs and other consignees, and recited that it was alleged by the defendant that the ship whilst in the prosecution of a voyage from Calcutta to London with a general cargo of indigo, jute, and other produce, was by perils and accidents of the seas stranded on the French coast, about twenty miles south of Boulogne, and that steps were at once taken by the master and the owner of the ship for the safety and preservation of the ship and cargo, and a large portion of the cargo was discharged from the ship and landed, and the same had since been forwarded to London by the defendant, and other large portions of the cargo had been saved and had arrived in London or elsewhere in England, either in the ship or otherwise. And the defendant alleged that he had paid and expended or had become liable to pay and expend large sums of money, and had incurred great expenses and made certain sacrifices in and about the saving and preservation of the ship and cargo and the forwarding of the same cargo to London and otherwise in consequence of the stranding, and that part of such sums of money, expenses and sacrifices, would be a charge upon the cargo, and that other portion thereof would be a charge on the ship or on the freight of the goods, and that other portion thereof would be a charge in the nature of general average on the ship, her cargo and freight. And that the said sums of money, expenses, sacrifices and damages could not yet be ascertained and adjusted, and the respective amounts and contributions due from the respective owners or consignees of goods by the ship in respect thereof could not yet be ascertained. And that the consignees had respectively applied to the defendant for delivery of the goods consigned to them respectively by the vessel, or of which they are respectively authorized to claim and take delivery as aforesaid, and the defendant had agreed to deliver the goods to them respectively on the freight due thereon being duly paid or secured to him, and upon receiving such payment on account of and security for the amounts and contributions which might be due from or in respect of the goods for general average or charges or otherwise, on account of the sums of money and expenses expended or incurred by the defendant, or on account of the sacrifices and damages as hereinbefore mentioned. And that the consignees in consideration of the delivery of their goods in manner aforesaid had respectively agreed to pay and had paid to the defendant on account of the amounts and contributions due from or in respect of their goods the sums of money respectively set against their signatures and the receipt whereof was acknowledged, and they had also respectively agreed to sign the undertaking hereinafter contained. And it was

witnessed that for the consideration aforesaid the consignees did respectively promise and agree to and with the defendant that they would as soon as conveniently might be, and within a reasonable time after the date of the agreement, respectively give to the defendant, or his agents true and correct particulars of the goods which should be so delivered to them respectively as aforesaid, and of the value of such goods, for the purpose of the adjustment of the general average and charges thereon. And, further, that when and so soon as the said sums of money, expenses, sacrifices and damages should have been duly adjusted, and the respective amounts or proportion due to the defendant from or in respect of the goods so delivered to them respectively, whether for general average or charges or otherwise on account of the said sums of money and expenses expended or incurred by the defendant as aforesaid or on account of such sacrifices or damage to the ship or goods as aforesaid had been duly ascertained, they would respectively pay to the defendant the amount or proportion so due in respect of their goods, after deducting therefrom the amount so paid by them on account as aforesaid, and for the considerations aforesaid the defendant promised and agreed to and with the consignees respectively that he should and would use all reasonable diligence to cause the said sum of money expenses and damages to be ascertained and adjusted and the amounts and contributions due from the consignees respectively in respect thereof to be ascertained according to law, and that in case the amount so paid to him on account of the said consignees or any or either of them, should, on the final adjustment, appear to exceed the amount due from such consignees or consignee respectively to the defendant, should and would forthwith return the balance or excess to such consignees or consignee respectively.

COCKBURN C.J. (at page 425): "I am of opinion that our judgment must be for the plaintiffs and against the shipowner, for the charge is one which cannot be supported. It divides itself into two heads—one for getting the ship away from the place where she stranded and the other for trouble taken in transhipping the cargo, identifying part of it, and arranging for the sale of another part which could not be identified. I think these services have nothing in common with general average. General average presupposes some sacrifice for the benefit of the whole adventure, which must be borne equally by all. Here the shipowner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight. He cannot be allowed to throw the whole cost of these proceedings upon those who to some extent share in the benefit from them. A great deal of what he has done was in the performance of his own contract. He was bound to use every effort to convey the cargo safely to its destination, and could only give up the task when it was hopeless. It cannot be said that the task was hopeless, when he was able at the cost of some trouble to bring the cargo into port. As to the expense incurred in respect of the articles which were identified, it was incurred for his own benefit, for unless he had delivered the goods to the proper owner he would not have obtained his freight. And as to those unidentifiable he took no further trouble but sold them through a broker who received his brokerage. In every respect therefrom the charges cannot be supported."

Mellor J. was of the same opinion on both points.

SVENDSEN *v.* WALLACE (1885)

APPEAL CASES, vol. x. page 404, HOUSE OF LORDS.

Marine Insurance—General Average—Expenses of reshipping cargo and of ship leaving port of refuge.

A ship on a voyage having sprung a dangerous leak, the captain acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo, and freight, landed in order to repair the ship. The ship was repaired, the cargo re-loaded, and the voyage completed:

Held, affirming the decision of the Court of Appeal, that the cargo owners were not chargeable with a general average contribution in respect of the expenses of reshipping the cargo.

Attwood v. Sellar (4 Q.B. D. 342; 5 Q.B. D. 286) discussed.

Appeal from a judgment of the Court of Appeal (Brett M.R. and Bowen L.J., Baggallay L.J. dissenting), which reversed a judgment of Lopes J.

On a voyage from Rangoon to Liverpool a ship sprang a dangerous leak, which justified the captain, for the common safety of the whole adventure, in putting into the port of St. Louis in Mauritius for repairs. In port the cargo was landed in order that the ship might be repaired under the circumstances related in the judgment of Lord Blackburn. The cargo was warehoused, and after the repair had been done was reloaded. The ship was piloted out to sea and completed her voyage. . . .

The only questions raised by the present appeal were whether the respondents were liable for a general average contribution in respect of the expenses of reshipping the cargo, of pilotage outwards, and of port dues outwards. The Court of Appeal (Brett M.R. and Bowen L.J., Baggallay L.J. dissenting) held that they were not, reversing the judgment of Lopes J. in favour of the appellants. The only matter decided by the House, as will be seen, was as to the expenses of reshipping the cargo.

LORD BLACKBURN (at page 409): "The appellants (plaintiffs below) are the owners of the vessel—the *Olaf Trygvason*. The nationality of the vessel is immaterial. She took on board at Rangoon a cargo of rice. A Bill of Lading for the whole cargo was signed, of which the material part is as follows: 'Shipped in good order and well conditioned by the Bombay Burmah Trading Corporation, Limited, in and upon the good ship called the *Olaf Trygvason*, now riding at anchor in the Rangoon river, and bound for Scilly, Falmouth, Plymouth, or Cowes for orders, thirteen thousand five hundred and eighty three bags cargo rice to be delivered, in like good order and well conditioned at the port of discharge (the act of God, the Queen's Enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatsoever nature and kind excepted) unto order or to its assigns. Freight for the said goods payable as per Charter Party.' The ship was ordered to Liverpool.

"The respondents (defendants below) are merchants in London who purchased the cargo of rice, and because assignees of the Bill of Lading. On the arrival of the ship at Liverpool, the respondents, as holders of the Bill of Lading and consignees of the whole cargo, were entitled to have the cargo delivered to them on discharging the

lien of the shipowners. But the captain had a lien on it, not only for the freight, as to which there is no dispute, but also for the payment of such disbursements as formed a charge on the cargo, as to the amount of which there was and is a dispute, and also for any amount which the cargo had to contribute to general average, as to the amount of which also there was and is a dispute.

"This often occurs, and it gives rise to a difficulty which is well expressed in the preamble to the average bond signed in this case, 'Whereas the said ship lately arrived in the port of Liverpool on a voyage from Rangoon, and it is alleged that during such voyage she met with bad weather and sustained damage and loss, and that sacrifices were made and expenditure incurred which may form a charge on the cargo or some part thereof, or be the subject of a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo should be delivered.'

"The mode in which this difficulty is commonly dealt with has at least for more than eighty years (see *Myer v. Van Der Deyl* [1803]) been, that the captain agrees to give up his lien on payment of the freight payable on delivery, and the various consignees of the cargo agree, in consideration thereof (and if required give security) to pay to the owners of the ship the proper proportion of any particular or other charges which may be chargeable on their respective consignments, or of any general average to which the owners of such consignment as such may be liable. As in the present case there was only one owner of the whole cargo and no dispute, as to either the quantity of the cargo or the amount of the freight; this left only two things to be determined—the amount of the special charges on the cargo which were payable by the respondents, and the amount of the general average charges of which the respondents have to pay the proportion payable in respect of the cargo, and of the freight paid in advance at Rangoon, which in effect was a part payment of the price of so much of the cargo, the proportion payable in respect of the ship and of the freight not yet paid being payable by those interested in them.

"The facts as to what took place on the voyage, what were the disbursements actually made, and under what circumstances they were made, cannot be proved by legal evidence without much delay and expense; but at least, when there is no suspicion of fraud or falsehood, the ship's papers enable an average adjuster of competent skill to approximate to them sufficiently to decide the case as an arbitrator, if the parties choose to give him authority so to act or, if they do not so authorize him, to apply the principles generally acted on by average adjusters so as to produce a practical result on which the parties can and generally, if the average adjuster is of repute, do act as having the moral weight of an award, though either party may, if they please, question his findings either of fact or of law, for it is not an award.

"In the present case two firms of repute, Lowndes & Ryley, of Liverpool, and W. Richards & Sons, of London, were employed to prepare adjustments. Each, as is usual, prefixed to the statement extracts from the ship's papers, showing the state of facts on which they acted. These are almost identical; and I think, looking at the two adjustments, they are agreed up to a certain point, and if it is open to me to form my opinion from the ship's papers, I should say that, so far, no reasonable person could differ from them.

" The vessel sailed from Rangoon on the 30th March 1880. She took the ground at low tide, but got off at high tide, and proceeded on her voyage after this accidental stranding. Till the 19th May she continued on her voyage, and on that day she deviated from the course of the voyage and ran for Mauritius. During these seven weeks she encountered strong winds and heavy seas, which caused the ship to strain and labour and make water. There was nothing, however, beyond ordinary perils of the seas, except that some spars and canvas were sacrificed in order to erect a windmill to assist in working the pumps. The cost of replacing those, less the usual allowance of one-third new for old, about £10, is allowed in general average by both adjusters. But it is clear that the vessel did not run for Mauritius on account of the windmill and, except as evidence confirmatory of the extent to which she was leaking by the 19th May, this is not material. Had the deviation not been justified by a sufficient cause it would have rendered the shipowners liable (see *Davis v. Garrett* [1830]), and therefore it is important to see what was the state of the vessel on the 19th May. Not only was she leaking at the rate of nine inches an hour, but when she came to anchor on the 22nd in the harbour of St. Louis she was found in the harbour to be making 10½ inches of water per hour; so that though there is no extraordinary weather noticed, the leak had in that day and a half increased greatly, and it was necessary to hire a considerable number of shore labourers, who were employed to pump her. The surveyors, who saw her on the 22nd whilst afloat in the harbour, found her still making 10½ inches an hour and recommended the cargo to be discharged until the leak stopped, or the vessel became sufficiently lightened to be placed in dry dock. On the 4th June the whole cargo, with the exception of about 100 tons, having been discharged, the surveyors again examined her and found the vessel still making seven inches of water per hour. They recommended the vessel to be put in dry dock for further examination of her bottom, which was done.

" It seems impossible to come to any other conclusion than that the vessel, though perhaps she might have reached her destination with such a leak, would have been in great danger, and consequently that it was quite justifiable to run into St. Louis; nor can it, I think, be disputed that everything which was done after the vessel came into harbour, until the vessel was removed into the dry dock, was reasonably done with a view to the common safety of ship, cargo, and freight, which, while such a leak existed were not in safety even in the harbour. Both adjusters must have agreed on this, for I find that each of them allows as General Average all the extra expenses up to that date, including port dues and pilotage inwards, the hire of the labourers who pumped, the expenses of the survey and the expense of landing the portion of the cargo unshipped between the 22nd May and the 4th June, as well as the cost of replacing the spars, etc., etc., sacrificed to make a windmill, amounting, in the whole, in round numbers to nearly £300 to general average. And if that had been all, there would have been no difference between them, and probably no dispute between the parties. But a difference, which any one who has read the case of *Attwood v. Sellar* [1880], and who was aware that the members of the firm of W. Richards & Sons are leading members of the association mentioned in the 5th paragraph of the special case there stated, and that Mr. Lowndes was the eminent average adjuster mentioned in the 6th paragraph, must have

anticipated, arose. Messrs. Lowndes and Ryley charged to general average the expenses of warehousing and insuring the cargo when on shore, amounting in round numbers to £190, and the expenses of reshipping the cargo amounting in round numbers to £446, and the outward dock dues amounting in round numbers to £20, and the outward pilotage about £5. They charged about £30 as special average to cargo and nothing to freight. Messrs. W. Richards & Sons charged the expenses of the cargo on land, amounting in round numbers, as already stated, to £190, to cargo as well as the smaller item of £30, as to which there is no controversy; and the other items which Messrs. Lowndes charge to general average, amounting in round numbers to near £500, to freight.

" Both agree in charging the expenses of taking the ship into dry dock, and the much more heavy expenses of repairing the vessel, amounting altogether to £1866, to ship and owners, so there is no dispute as to those items.

" There is some difference apparently as to the value put upon the ship as a contributory subject, into which it is not necessary to inquire.

" The result is, Lowndes & Co. apportioning the general average as they made it out amongst the subjects contributory as they valued them, made Messrs. Wallace as owners of the cargo and the prepaid freight liable to pay as contribution to general average £740, and in respect of particular average £30, in all £770. I omit shillings and pence. Messrs. Richards & Sons made them liable to pay as contribution to general average £467, as particular average on the cargo £215 (including the £30), in all £681. I again omit shillings and pence. Messrs. Wallace paid that sum, and for the difference between it and £770 this action was brought.

" There were two issues joined, one on a plea that there was a custom so general as to have the effect of being incorporated in all contracts, by which the rule of practice of adjusters contended for by the respondents was established, which was denied. The other was a general plea of payment before action of £681 : 13 : 1, to which the plaintiffs replied that they had received it, but that it was not enough to satisfy their claim. Both issues came on to be tried before Lopes J. and a special jury. The judge ruled that there was no evidence fit to be left to the jury in support of the custom. On this there has been no appeal to this House. The jury were discharged on the issue as to the sufficiency of the payment, and that was reserved for further consideration. No evidence was called on this issue, and nothing was said as to how the facts were to be ascertained, if it became material to ascertain any of them not expressly admitted. I do not think it was supposed by either side, certainly, from the terms of his judgment, not by Lopes J. that anything could depend on the special circumstances; and it was not until reading the judgment of Bowen J.L. I came upon this opinion: 'The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average necessarily depends on the circumstances of each case,' and on further consideration agreed in it, that I became aware of the importance of having some means of ascertaining what the circumstances were. Without some such power no judgment except a *venire de novo*, could be given, unless it could be laid down as a general proposition of law either that no expenses of warehousing the cargo and afterwards reshipping it in a port of refuge can ever be general average expenses

or that they must always be so. I am not prepared to assent to either proposition. Any State may by its legislature enact that within its territories the law shall be either way. Judging merely by the language of their codes (which, however, is often apt to mislead unless construed with reference to their law and usage), I should say that some foreign nations have enacted in opposite ways. There is, however, no English enactment on the subject. I have no doubt that both parties would, if it had occurred to any one that it was necessary or even desirable so to do, have readily agreed to give the Court power to look at the ship's papers, and, if it thought fit, draw inferences from them as an average adjuster would do. I propose to deal with this case as if such a power was given.

"In *Simonds v. White* [1824], Abbott C.J. says: 'The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract, but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses which are considered to fall within this principle.'

"The point decided in that case was that the loss was to be adjusted according to the law of the place of the destination, in that case Russia, and that the Russian adjuster was to adjust it according to the Russian law, which of course was to be gathered from the Russian edicts and the decisions of the Russian judicature; and that, though the ship and the parties were English, the goods' owners could not recover back so much of the money as would not have been charged to them on an adjustment of average made according to the law of England. As in the present case the place of delivery was English, this is an authority, if one was required, to show that the law and usage of foreign nations where they differ from our own are irrelevant. But it will be observed that Abbott C.J. expressly says that a contract might alter the whole; and in *Wilson v. Bank of Victoria* [1867] it was intimated that a custom tacitly making it a part of the contract that any particular principle should be applied might alter the whole. I think that, unless it was proved that there was such a custom as to be tacitly incorporated, it could have no such effect. And I have no doubt that the issue, which has not been brought here by appeal, was rightly decided.

"I think, however, that there is much force in the concluding observations of Manisty J. in *Attwood v. Sellar*. I agree with him at least this far, that a general practice, long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not in general inconvenient, and that it throws a considerable onus on those who impugn it to show that the particular circumstances are such as to render an adherence to the practice in that case against principle.

"Before proceeding further, I think it desirable to consider what is the question raised on the issue reserved for further consideration. The plaintiffs claimed the sum which Messrs. Lowndes & Ryley made payable, viz. £770. The defendants had paid the sum which Messrs. W. Richards & Sons made payable by them. The issue was

whether all that was really due had been paid. It is to be observed, first, that the points on which Messrs. W. Richards & Sons differ from Messrs. Lowndes & Ryley are not all in favour of the defendants. If the £190 which represents the warehousing rent and fire insurance is properly charged to cargo the defendants have to pay the whole of it. If it is properly charged to general average, they have only to pay their proportion of it, or somewhat less than one half. That, if it stood alone, would make nearly £100 more payable by the defendants. But if the £450 which is the cost of reshipping is properly charged to freight, the defendants are not liable to pay any portion of it. If it is properly charged to general average they would have to pay about half of it. So that that item makes a difference of about £230. If in addition the £20 for the cost of going out of port is properly charged to freight, that makes a further difference of about £10. It is not therefore necessary to decide anything more than whether these two items are, under the circumstances of the case, properly chargeable to general average or not. If they are not so chargeable, the order appealed against is right, for the defendants have paid enough, and more than enough, whether the £190 is properly chargeable to cargo or not; and it is unnecessary to consider that question, except in so far as it may throw light on the principles which are to guide the decision of the first and most important one.

"I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed. I think on examining the two adjustments and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the extent which she did, was not safe even in the harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should.

"I am afraid I have not understood the reasoning on which Cockburn C.J. in his judgment in *Attwood v. Sellar* comes to a contrary conclusion. If I have, I must express dissent from it.

"The ordinary contract between shipowner and merchant is that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils. And this generally should be done in the original ship. Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it.

"*Rosetto v. Gurney* [1851] was a case between the owners of corn insured from Odessa to Liverpool, and their underwriters. The plaintiffs claimed for a total loss, and the underwriters paid money into court. The cargo was at Cork in a very damaged state, but by great skill, and at considerable cost, was prevented from turning into manure, and was sold at Cork, a considerable part of it being still corn. The verdict was entered for a total loss. A rule for a new trial was

obtained on various grounds ; one, on which it was made absolute, was that the judge had not properly directed the jury as to the effect of the extra cost of conveyance in a new bottom from Cork, the port of distress, where the wheat was sold, to Liverpool, the port of destination.

“ The Court say as to this : ‘ If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transhipps because the original ship is irreparably damaged without considering whether he is *bound* to tranship or merely *at liberty* to do so, it is clear that he transhipps to earn his full freight ; and so the delivery takes place upon the original contract.’ There never was in the present case any question as to the *Olaf Trygvason* being irreparably damaged ; but she was so far damaged that it was certain that there would be some delay (it turned out to be about six weeks) before the *Olaf Trygvason* was in a fit state to carry the goods on to Liverpool. And if there had been a good ship at St. Louis willing to carry the goods to their destination for less than the agreed freight from Rangoon, it might have been for the benefit of all that the goods should be shipped on that vessel at once, carried on, and delivered to the consignees without delay. Such was the course pursued in *Shipton v. Thornton* [1838], where the original shipment was from Singapore to London in the *James Scott*. She put into Batavia in distress, and there the goods were transhipped into the *Mountaineer* and the *Sesostris*, carried to London, and there delivered to the owner of the *James Scott* at a cost less than the amount of the freight which he would have earned had the goods been carried on in the *James Scott*. He delivered them to the consignee who produced the original Bill of Lading, by the *James Scott*. The consignee refused to pay freight at the rate in the Bill of Lading of the *James Scott* from Singapore to London, though he paid that from Batavia agreed on in the Bills of Lading of the *Mountaineer* and the *Sesostris*. The decision was that whether or not the captain was bound to tranship, he was at liberty to do so, and having done so, had earned his full freight, the expense which he had incurred to earn it being certainly not general average, but I think a particular average paid by the shipowner to earn his freight. My conclusion is that, if instead of transhipping, the captain waits until the original ship is repaired and then reships on that original ship, the cost of so doing should not be general average but particular average to earn the full freight. Cockburn C.J. seems to think that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved and a new one formed by law. This seems to me in direct conflict with the two decisions I have just cited ; and even if it were so, I think it is somewhat in the nature of a *petitio principii* to say that one of the terms of the new contract should be that the cost of transhipment or re-shipment, as the case may be, should be general average.

“ The judgment, however, of the Court of Appeal, delivered by Thesiger L.J., does not proceed on this ground. I have some difficulty after reading the statement as to the grounds on which the Court of Appeal proceeded, given by Baggallay L.J. in his judgment in the present case, in saying on what ground it does proceed.

“ The special case in *Attwood v. Sellar* was express that the ship was injured by a voluntary sacrifice, and was thereby compelled to put in to Charleston to repair the said damage. It is not expressly said either way whether the cargo was in any danger. Baggallay

L.J., who was a party to that judgment, says that it was decided on the ground that putting into the port of refuge was necessary for the safety of both ship and cargo, and that he at least thought it was immaterial what was the cause of that necessity. Yet I think there is much reason for doubting if Thesiger L.J. quite agreed in this. He says: 'The principle which underlies the whole law of general average contribution is that the loss, immediate and consequential, caused by a sacrifice for the benefit of cargo, ship, and freight, should be borne by all. This principle is in the abstract conceded by counsel for the defendants, and its application to the present case is admitted to the extent of allowing the expenses of unloading the goods, for the purpose of doing the necessary repairs to enable it to proceed on the voyage, to be the subject of general average contribution, but they attempt to distinguish such expenses from those of warehousing and reloading the cargo, and of outward port and pilotage charges, by the suggestion that the common danger to the whole adventure is at an end when the goods are unloaded, and that general average ceases at the point of time when the common danger ceases.' This is I think a fair statement of the argument of the respondents' counsel in the present case. Afterwards he says, 'The going into port, the unloading, warehousing, and reloading, are at all events parts of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous.' This was much relied on by the counsel for the respondents. If I thought it was the state of the case before the House, I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage, and therefore in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in *Attwood v. Sellar*, to be borne by all, but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry.

"Having come to the conclusion that, under the circumstances of this case, the expenses of reloading, etc., should not be placed to General Average, and that being enough, if your Lordships agree with me, to show that the respondents have paid more than enough, it is not necessary to consider whether the smaller sum of £20 ought also to have been charged to ship or freight, and not to general average. I agree with Bowen L.J. in what he says at page 90, that that is a more difficult question than the other. And as the amount is not sufficient to turn the scale it is not necessary to decide it. I should think it seldom involved any sum so great as to be of practical importance, and I prefer leaving it undecided.

"I shall therefore move that the order appealed against be affirmed, and the appeal dismissed; the appellants to pay the costs."

Lords Watson and Fitzgerald concurred.

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